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PETITION AND TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 252

THE UNITED STATES, PETITIONER

vs.

ARTEMUS C. WELLS, ET AL., EXECUTORS OF THE ESTATE OF JOHN W. WELLS

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JULY 3, 1930
CERTIORARI GRANTED OCTOBER 13, 1930

(35174)

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1 In the Supreme Court of the United States.

October Term, 1930

No. 252

THE UNITED STATES, PETITIONER

v.

ARTEMUS C. WELLS ET AL., EXECUTORS OF THE ESTATE OF JOHN W. WELLS

Petition for a writ of certiorari to the Court of Claims

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above case rendered April 7, 1930, and reported in 39 F. (2d) 998.

STATUTES INVOLVED

Section 402 of the revenue act of 1918, c. 18, 40 Stat. 1057, 1097, provides, in part, as follows:

"SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * * *

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death

2 (whether such transfer or trust is made or created before or after the passage of this act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; * * *".

STATEMENT

John W. Wells, a resident of Michigan, died testate on August 17, 1921, at the age of 73 years. (Finding 2.) The respondents are the executors of his estate. (Finding 1.) Within two years prior to his death decedent made three transfers of the aggregate value of $782,903 to his children without consideration. (Finding 35.) These transfers constituted approximately half and were a material part of his property. (Finding 36.) One transfer made in December, 1919, was of securities valued at $103,808, and the last two transfers made

in January, 1921, within eight months of his death, aggregated in value $679,095. (Finding 35.) The last of these transfers, amounting to $334,170, was given in final equalization of advancements made during the twenty preceding years to his five children and recorded in separate accounts kept by the decedent. (Findings 4 and 22.) His will, executed in a hospital in Chicago in August, 1920, five months prior to this equalization, provided that all advance-
3 ments should be charged to and deducted from his children's respective shares. (Finding 12.) At about the same time, in the hospital, decedent executed a postnuptial agreement with his wife to will her $100,000 in lieu of her statutory rights. (Findings 11 and 12.)

In April, 1920, eight months prior to the final transfer and equalization of the advancements to his children, decedent, while in California, became afflicted with ulcerative colitis, an aggravated form of dysentery. (Finding 8.) Decedent's father had died of chronic dysentery. (Finding 6.) Physicians advised decedent he had cancer of the intestines, and on July 9, 1920, he went to the Presbyterian Hospital in Chicago, where the disease was diagnosed as ulcerative colitis. (Finding 9.) He remained at the hospital two months and a half. (Findings 9 and 14.)

In November, 1920, decedent returned to the hospital for an operation for ethmoiditis to relieve his asthma (Finding 18), from which he had suffered for five years (Finding 5). During his ten-day stay the treatment for ulcerative colitis was continued. (Finding 18.)

In December, 1920, and January, 1921, decedent finally equalized the advancements to his children as above stated. (Findings 19 and 20.)

In April, 1921, while in California, the decedent had a recurrence of the ulcerative colitis, which was then suspected to be cancer of the intestines. An operation was advised. (Finding 29.) He re-
4 turned to the Chicago hospital in June, 1921, for the fifth time, suffering from a virulent attack of the same disease that did not respond to treatment. (Finding 30.) An abdominal operation to relieve the acute ulcerative colitis was performed on August 10, 1921. He died August 17, 1921. The death certificate gave as the cause of death "supperative colitis" and its "duration 1 yr." (Finding 31.)

The Commissioner of Internal Revenue determined that the three transfers were made in contemplation of death and included their value in decedent's gross estate. (Finding 32.) The respondents paid the tax assessed and upon rejection of their claim for refund, on the ground that the transfers were not made in contemplation of death (Finding 33), brought this suit in the Court of Claims. That court upon its special findings of fact, which did not include any finding as to whether the transfers in question were made in contemplation of death, rendered judgment, as a conclusion of law from such findings, in favor of the plaintiffs for the sum of $83,683.62, with interest, stating that in its opinion:

"Applying these facts to the rule that the term 'contemplation of death' does not mean that general knowledge of all men that they must die, but that there must be a present apprehension, from some existing bodily or mental condition or impending peril, creating a reasonable fear that death is near at hand, and that such reasonable fear or apprehension must be the direct or animating cause, and the only cause of the transfer, it seems quite clear to us that the transfers in question were not made in contemplation of death." (39 F. (2d) 998, 1011.)

QUESTION PRESENTED

Whether in determining the taxable estate of a decedent under section 402 (c) of the revenue act of 1918, the value of a material part of his property transferred by him to his children within two years prior to his death as advancements should be excluded as not having been made in contemplation of death because a reasonable fear of immediate death was not the direct and only cause of the transfer.

5

SPECIFICATION OF ERRORS

The court below erred—

1. In holding that "contemplation of death," as used in 402 (c) of the revenue act of 1918 is limited to "a present apprehension, from some existing bodily or mental condition or impending peril, creating a reasonable fear that death is near at hand."

2. In holding that "a transfer made in contemplation of death," as used in section 402 (c) of the revenue act of 1918, means a transfer of which a reasonable apprehension of death near at hand is the direct, animating, and only cause.

3. In giving judgment for the respondents.

REASONS FOR GRANTING THE WRIT

1. Error was committed by the Court of Claims in concluding and ruling as a matter of law from the facts found that the three transfers in question were not made in contemplation of death within the meaning of section 402 (c) of the revenue act of 1918.

The transfers in question were made within two years prior to August 17, 1921, the date of the decedent's death, and, unless shown to the contrary, they are deemed to have been made in contemplation of death within the meaning of the statute. The special findings of the court below do not include a finding that the transfers were or were not made in contemplation of death. It is sub-

6 mitted that the court erred in deciding as a conclusion of law upon the special findings of fact that the respondents were entitled to recovery in this case.

If the court correctly stated the rule, its conclusion that the transfers were not in contemplation of death undoubtedly finds adequate

support in the special findings of fact and in the inferences deductible from these findings. But unless contemplation of death means expectation of death near at hand from an ascertained cause, we submit that no such conclusion can be predicated upon the findings.

The fact that the transfers were made to carry out the decedent's policy for the distribution of a material part of his property among his children before his death in the form of "advancements" is entirely clear. (Finding 4.) The decedent and the court below specifically designate the gifts and transfers in question as "advancements" by the decedent to his children. (Findings 4, 12.) His will, executed on August 18, 1920, contained the following clause: "Provided, however, that the amounts shown to be due me from each of my children severally in accordance with my books at the time of my death, shall be considered advancement made by me to them from time to time and shall be chargeable to each of them severally as advancements and shall be deducted from their respective shares." (Finding 12.) The property was carefully divided equally among the children and interest was charged on the father's books
7 against all advancements so made in order that, in the long run, each child should share equally in the portion of the father's estate that he was distributing among them during his life. It is submitted that regardless of the decedent's condition of health at the time of the advancements to his children, the very nature of the advancements and the manner and circumstances under which they were made indicate conclusively that the decedent had in contemplation the situation that would exist upon his death as respects the devolution of his estate. It is of the very nature of an advancement that it is made in anticipation of the parent's death. The language above quoted from decedent's will leaves no doubt that the advancements here in question were regarded by the decedent as in effect testamentary dispositions.

2. Error was committed by the court below in applying to the facts found "the rule that the term 'contemplation of death' does not mean that general knowledge of all men that they must die, but that there must be a present apprehension, from some existing bodily or mental condition or impending peril, creating a reasonable fear that death is near at hand, and that such reasonable fear or apprehension must be the direct or animating cause, and the only cause of the transfer, * * *" (39 F. (2d) 998, 1011.)

It is submitted that such a rule narrows the operation of the statute to such an extent as to defeat its purpose and is in
8 conflict with other Federal decisions on the point. The purpose of section 402 (c) of the revenue act of 1918, in taxing transfers of property of the kind here involved, is to avoid the loss of revenue which otherwise would result by the withdrawal of property from the operation of the provisions of the statute taxing transfers by succession or testamentary disposition. That Congress regarded the presumption at the end of section 402 (c) as vital is

shown by the fact that the revenue act of 1926 contains the same presumption, now irrebutable, in the form of a rigid rule of law.

The statute here in question provides that a transfer of a material part of the decedent's property in the nature of a final disposition or distribution made within two years prior to his death shall, unless shown to the contrary, be deemed to have been made in contemplation of death. The rule laid down by the court below adds two further criteria not in the statute and inconsistent with it, namely: That there be fear of death near at hand and that the only cause of the transfer be such fear. We submit that one may contemplate death several years prior to its occurrence. Indeed, transfers made in contemplation of death at any time whatsoever are subject to the tax. (Cf. Shwab v. Doyle, 258 U. S. 529, 535–536.) Moreover, a gift prompted by a desire to evade the inheritance tax or by other moving causes that may be coupled with the fear that death is near at hand, is no less made in contemplation of death within the meaning of the taxing act, because such desire or other moving cause contributes to cause the transfer to be made. Indeed,
9 other motives always animate the donor in disposing of his property.

In Shwab v. Doyle, 269 Fed. 321 (C. C. A. 6th Circuit), reversed in 258 U. S. 529, on other grounds, the plaintiff in the District Court requested that the court charge:

"The words 'in contemplation of death' do not refer to that general expectation of death which every mortal entertains, but rather the apprehension which arises from some existing condition of body or some impending peril." (P. 327.)

The court in the Shwab case refused plaintiff's request and instructed the jury in part as follows:

"Nor is it necessary, in order to constitute a transfer in contemplation of death, that the conveyance or transfer be made while death is imminent, while it is immediately impending by reason of bodily condition, ill health, disease, or injury, or something of that kind. But a transfer may be said to be made in contemplation of death if the expectation or anticipation of death in either the immediate or reasonably distant future is the moving cause of the transfer." (P. 328.)

The Circuit Court of Appeals in sustaining the trial court said:

"It may be conceded that plaintiff's requested instruction would have been proper as applied to a gift claimed to have been made causa mortis—when the grantor was in a dying condition. But the instant case presented no such issue or claim. The transfer in question was an absolute gift inter vivos, claimed by the Government to have been testamentary in character." (Page 328.)

In Rengstorff v. McLaughlin, 21 F. (2d) 177, 178 (D. C. N. D. Calif.) the court said in its opinion:

"A transfer, in order to be characterized as one 'in contemplation of death,' need not be one made in anticipation of imminent

demise as the result of an existing illness or malady, as in
10 the case of a gift causa mortis. On the contrary, it is possible that a person of comparative youth, enjoying good health, may nevertheless make a transfer of property 'in contemplation of death,' within the meaning of that phrase."

With such statements of the law the decision of the Court of Claims in the instant case is clearly in conflict. It is submitted that transfers made in contemplation of death within the meaning of the taxing act here involved are not confined to transfers made under the conditions of gifts causa mortis.

CONCLUSION

There has been no decision in point by this court. There are many tax cases now pending involving large sums of taxes collected which the United States must refund if the decision of the court below is a true statement of the law. Because of the importance of the question involved in the administration of the tax laws and the conflict of decisions thereon, it is submitted that the decision of the court below should be reviewed by this court.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

JULY, 1930.

11 In the Court of Claims of the United States

No. H-321

ARTEMUS C. WELLS, RALPH W. WELLS, DANIEL WELLS, EDNA W. Walsh, and Florence W. Law, executors of the estate of John W. Wells, deceased, plaintiffs.

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

I. *Petition*

Filed August 3, 1927

To the Honorable the Court of Claims:

The plaintiffs, Artemus C. Wells, Ralph W. Wells, Daniel Wells, Edna W. Walsh, and Florence W. Law, executors of the estate of John W. Wells, deceased, through their attorneys, W. W. Spalding and Robert A. Littleton, by this their petition herein, respectfully show:

12 I. At all times herein mentioned plaintiffs were and are the executors of the estate of John W. Wells, deceased, as will more fully appear from an order or decree of the probate court of

Menominee County, State of Michigan. An exemplified copy of said order or decree evidencing the appointment and qualification of plaintiffs, as executors of said estate, is here produced and shown to the court, made a part of this petition, and marked Exhibit "A" for identification. The plaintiffs maintain this action in their capacity as executors of the estate of John W. Wells, deceased.

II. Plaintiffs have a just claim for the recovery from the United States of $83,683.62, with interest from the 27th day of May, 1924, being an amount paid by plaintiffs to the collector of internal revenue for the district of Grand Rapids, State of Michigan, on the 27th day of May, 1924. The said amount of $83,683.62 was paid by plaintiffs under protest and duress, and was claimed to have been collected from plaintiffs by the collector of internal revenue at Grand Rapids, Michigan, as additional estate taxes under the provisions of section 401 of the revenue act of 1918. Plaintiffs further claim interest at 6 per cent per annum on said amount of $83,683.62, from the date of payment on the 27th day of May, 1924, to the date on which refund is made.

The provisions of law under which said assessment and collection of additional estate taxes were claimed to have been made by the said collector of internal revenue (which amount of $83,683.62
13 the said collector has paid into the Treasury of the United States) are sections 401 and 402 (c) of the revenue act of 1918. The provisions of the law under which plaintiffs maintain this action are sections 401 and 402 (c) of the revenue act of 1918, and sections 3220 and 3226 of the Revised Statutes, as amended.

III. Within the time allowed by law plaintiffs duly filed with the collector of internal revenue at Grand Rapids, Michigan, a claim for the refund, with interest, of $88,299.77, the amount paid to the defendant as aforesaid, as additional estate taxes on the estate of John W. Wells, deceased (plus interest paid), and as the basis of said claim stated that the value of the property on which said additional estate taxes were computed, assessed, and collected, was no part of the estate of the said John W. Wells passing at the date of his death.

Said claim for refund was originally for the amount of $88,299.77, which was allowed by the Commissioner of Internal Revenue in the amount of $4,616.15, and rejected in the amount of $83,683.62. Said claim for refund was rejected for the amount of $83,683.62 on the alleged ground that the value of the property on which additional estate taxes had been assessed and collected was a part of the taxable estate passing at the date of the death of John W. Wells, under the provisions of section 402 (c) of the revenue act of 1918, because, as claimed by said commissioner, said property was transferred by the decedent in contemplation of death. All said estate taxes paid by the plaintiffs as aforesaid are still retained by the defendant.

14 IV. Plaintiffs would show the court that the decedent, John W. Wells, died August 17, 1921, and that they are the duly nominated, appointed, and qualified executors of his estate. That

in the estate tax return, filed by them in 1922, they reported a net taxable estate of $883,485.08, on which they paid in 1922 estate taxes of $42,178.81. In 1923 an audit of said estate tax return was made by the Bureau of Internal Revenue, and on the basis of said audit there was proposed, determined, and assessed an additional estate tax against plaintiffs in the amount of $175,278.48, which amount, under claims for abatement and refund, was reduced to $83,683.62—the amount now claimed as a refund, and sued for in this case.

In so determining the estate tax liability of said estate, the Commissioner of Internal Revenue added to the taxable estate reported by plaintiffs in their said return certain properties transferred by the decedent to his sons and daughters, on the alleged ground that the transfer of said properties was made by decedent in contemplation of death within the meaning of section 402 (c) of the revenue act of 1918. Said properties, the person to whom transferred, the month and year in which the transfers were made, and the value of the property were as follows:

(a) 1,280 shares of stock in J. W. Wells Lumber Company to Daniel Wells and Artemus C. Wells in December, 1919, and December, 1920	$103,808.00
15 (b) 69,985 shares of stock in Girard Lumber Company transferred to decedent's children at various times during the year 1920	462,190.50
(c) 3,713 shares of stock in Heywood Wakefield Company, transferred to decedent's wife and children in accordance with trust agreement dated January 1, 1921	371,300.00

The total value placed on this property by the Commissioner of Internal Revenue at which it was included in the taxable estate of the decedent for estate tax purposes was $937,307.50.

In determining that said property should be added to the reported taxable estate, the Bureau of Internal Revenue erred to the prejudice of plaintiff's substantial rights.

The transfers of said properties were not made by the decedent in contemplation of death, nor were said transfers intended to take effect in possession or enjoyment at or after death of the decedent. Plaintiffs will show to the court that said transfers were made in good faith and not for any purpose within the meaning of section 402 (c) of the revenue act of 1918. Plaintiffs will also show to the court, and it is true, that at the time said transfers were made the transferor was well, active in business, and entertained no thought of death in the near future, and that the motivating cause of said transfers was not contemplation of death.

16 By making said additions to the taxable estate the Bureau of Internal Revenue overstated the value of the taxable estate in the amount of $937,307.50, and thereby overstated the correct estate tax liability in the amount of $88,299.77, including interest, as hereinbefore stated.

V. Plaintiffs therefore ask for the refundment of $83,683.62, plus interest on same from the date of payment until refunded to plaintiffs.

VI. This suit is brought subsequent to the rejection of said claim for refund, and within five years from the date of the payment of said alleged additional estate taxes.

VII. Plaintiffs and their decedent have at all times borne true allegiance to the Government of the United States, and have not, in any way, voluntarily or otherwise, aided or abetted or given encouragement to rebellion against such Government; and are and always have been the sole and absolute owner of the claim herein presented, and have made no assignment or transfer of said claim, nor any part thereof, nor any interest therein; and are justly entitled to the amount herein claimed from the United States, after allowing all just credits and set-offs; and no action has been had on this claim in Congress nor by any of the departments, except as hereinbefore stated.

VIII. Plaintiffs believe the facts as hereinbefore stated to be true.

17 Wherefore the plaintiffs pray judgment against the United States of America upon the facts and law hereinbefore set forth for $83,683.62, with interest, and for such other relief as may appear equitable and proper as this cause progresses.

ARTEMUS C. WELLS,
RALPH W. WELLS,
DANIEL WELLS,
EDNA W. WALSH, and
FLORENCE W. LAW,
Executors of Estate of John W. Wells, Deceased.
By A. C. WELLS,
Acting for Himself and Co-executors.

W. W. SPALDING,
ROBERT A. LITTLETON,
Attorneys for Plaintiffs,
Woodward Building, Washington, D. C.

[*Duly sworn to by Artemus C. Wells. Jurat omitted in printing.*]

19 *Exhibit "A" to petition*

(Copy)

STATE OF MICHIGAN:
The Probate Court for the County of Menominee.

At a session of said court, held at the probate office in the city of Menominee in said county, on the 26th day of September, A. D. 1921.

Present, Hon. John Stiles, judge of probate.

In the matter of the estate of John W. Wells, deceased.

This day having been appointed for hearing the petition of Ralph W. Wells praying for the probate of the instrument heretofore filed in said court, purporting to be the last will and testament of said deceased and due notice of the hearing on said petition having

been given as directed by said court, the said petitioner appeared in person.

It appearing to the court from the testimony of W. E. Hallenbach, one of the subscribing witnesses to said instrument, that said deceased signed and duly executed said instrument as and for his last will and testament in the presence of sufficient and competent witnesses, and that said witnesses attested and subscribed said instrument as subscribing witnesses thereto, at the request of said deceased in his presence, and in the presence of each other, and that said deceased at the time of the execution thereof was of full age and sound mind, and under no restraint or undue influence;

It further appearing, that said deceased died on the 17th day of August, A. D. 1921, and at the time of his death was an inhabitant of the city of Menominee in said county, and that said instrument has been duly proved, and ought to be allowed as the last will and testament of said deceased;

It is ordered, that said instrument be and is hereby allowed and admitted to probate as the last will and testament of said deceased, and that the same be recorded as required by law;

It is further ordered, that the execution of said will be committed, and the administration of the estate of said deceased be granted to Florence W. Law, Daniel Wells, Artemus Carter Wells, Edna W. Walsh, and Ralph W. Wells.

(Signed) JOHN STILES,
Judge of Probate.

Exemplification

I, Ernest A. McCue, of the city of Menominee, County of Menominee, State of Michigan, a notary public in and for said county, do hereby certify that I have compared the above copy of order admitting will to probate with the original thereof and have found the same to be a correct transcript therefrom and of the whole of such original.

In witness whereof, I have hereunto set my hand and affixed my seal, at the city of Menominee, this 8th day of June, 1922.

[SEAL.] (S.) ERNEST A. MCCUE.

My commission expires June 17, 1925.

STATE OF MICHIGAN:
The Probate Court for the County of Menominee.

In the matter of the estate of John W. Wells (deceased).

I, Katherine Stiles Laughton, register of said court, having the legal custody of the files and records thereof, do hereby certify that I have compared the attached copy of will, order admitting will to probate, certificate on probate with the original thereof on file in said court, and have found the same to be a correct transcript therefrom, and of the whole of such original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the city of Menominee in said county, this 27th day of September, A. D., 1921.

(Signed) KATHERINE STILES LAUGHTON,
Register of Probate.

Exemplification

I, Ernest A. McCue, of the city of Menominee, county of Menominee, State of Michigan, a notary public in and for said county, do hereby certify that I have compared the above exemplification of record in the matter of the estate of John W. Wells, deceased, with the original thereof and have found the same to be a correct transcript therefrom and of the whole of such original.

In witness whereof, I have hereunto set my hand and affixed my seal, at the city of Menominee, this 8th day of June, 1922.

[SEAL.] (Signed) ERNEST A. MCCUE.

My commission expires June 17, 1925.

22 Know all men by these presents, that I, John W. Wells, of Menominee City and County, in the State of Michigan, being of full age and of sound disposing mind, memory, and understanding, nevertheless not unmindful of the uncertainties of human life do make, publish, and declare this my last will and testament, in the manner following, hereby revoking all former wills by me made.

1. I will and direct that as soon as may be after my decease, all of my just debts, if any there be, and the expenses of my last sickness and funeral and of administering upon my estate be paid out of my personal estate.

2. I give and bequeath unto my wife, Katherine Wells, for her absolute use one hundred thousand dollars ($100,000) in money, five thousand dollars ($5,000) thereof to be paid to her within thirty days after my decease and five thousand dollars ($5,000) at the end of each succeeding thirty days thereafter until the unpaid balance can be paid to her entire or in larger portions, without material injury to my estate, in discretion of my executors; said legacy to be wholly paid within one year and a day after my decease. I also give, devise, and bequeath to my said wife, the use during her life of the family homestead, situated at No. 1207 Main Street, in Menominee aforesaid, and the land and premises occupied in connection therewith. I also give and bequeath to my said wife, for her absolute use the wearing apparel and personal ornaments whereof I died possessed; also the household furniture, furnishings, equipment, books, works of art, ornaments, musical instruments or appliances, music and all other chattels or effects, together with the fuel, housekeeping provisions and other consumable stores
23 which shall at my decease be in or about my said homestead, except money and securities for money, evidences of debt and of title, and accounts, vouchers, and manuscripts; and excepting stocks, bonds, and securities. I also give and bequeath to my said

wife, for her absolute use all horses, cows, and other animate property, and all carriages, cutters, sleighs, automobiles, and other vehicles, and all barn or garage tools, utensils, implements, appliances and equipment which shall at my decease be owned by me for my personal or family use, whether the same be then upon my homestead premises or elsewhere; all consumable stores then at the barn on said homestead premises. The provisions for my said wife in this item shall be given to and received by her in lieu of and to the exclusion of any and all dower or right of dower in my real estate, and all allowances, distributive share, all interests of every kind in my estate.

3. All the rest and residue of my estate, of every name and nature, and wheresoever the same may be situated, I give, devise, and bequeath share and share alike unto my children, Florence Ada Law, Daniel Wells, Artemus Carter Wells, Edna Ethel Wells, and Ralph Waldo Wells and to heirs of any thereof, deceased, according to the right of representation, and to any child or children thereafter born by me begotten. To have and to hold the same, to my said children, and the heirs of any thereof, deceased, according to the right of representation, and to their respective heirs and assigns, forever. Provided, however, that the amounts shown to be due me from each of my children severally in accordance with my books at the time of my death shall be considered advancements made by me to them from time to time, and shall be chargeable to each of them severally as advancements and shall be deducted from their respective shares.

24 4. Reposing entire confidence in the ability and integrity of my children, I appoint the said children executors of this will, and I request that they and each thereof, be not required to give any bond or bonds for the faithful execution of said trust; and I hereby authorize and empower them and the survivors or survivor thereof, or the majority of them or of the survivors to compound or compromise any claim or demand that may be either for or against my estate, or to extend the time of payment of any note, claim, or demand that may be either for or against my estate. And I also authorize them or the survivors or survivor thereof, or the majority of them, or of such survivors, to negotiate, grant, bargain, sell, and convey any part of my estate or interest therein, without application to or the intervention of any court.

It is my desire that my estate be administered, and the residue thereof distributed without unnecessary delay, and with as much dispatch as may be used without detriment to the full preservation and realization thereof.

In witness whereof I have hereunto set my hand and seal this 18th day of August A. D., 1920.

JOHN W. WELLS. [SEAL.]

Witnesses:
A. C. WELLS.
W. E. HALLENBECK.

The above and foregoing instrument consisting of four pages, including this page, was on the day of the date thereof, signed, sealed, published, and declared by the said John W. Wells to be his last will and testament in the presence of us, who, at his request and in his presence and in the presence of each other have hereunto subscribed our names as attesting witnesses thereto.

25 _____ _____ of _____ _____.

_____ _____ of _____ _____.

_____ _____ of _____ _____.

Exemplification

I, Ernest A. McCue, of the city of Menominee, county of Menominee, State of Michigan, a notary public in and for said county, do hereby certify that I have compared the above last will and testament of John W. Wells, deceased, with the original thereof, and have found the same to be a correct transcript therefrom and of the whole of such original.

In witness whereof, I have hereunto set my hand and affixed my seal, at the city of Menominee, this 8th day of June, 1922.

[SEAL.] (S.) ERNEST A. McCUE.

My commission expires June 17, 1925.

Know all men by these presents, that we, Katherine J. Wells, Florence W. Law, Daniel Wells, Edna W. Walsh have made, constituted and appointed, and by these presents, do make, constitute, and appoint Ralph W. Wells and Artemus C. Wells our true and lawful attorneys for us and in our name, place, and stead, giving and granting unto Ralph W. Wells and Artemus C. Wells, said attorneys, full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in the matter of the estate of John W. Wells, as fully to all intents and purposes, as we might or would do if personally present, with full power to substitution and revocation, hereby ratifying and confirming all that Ralph W. Wells and Artemus C. Wells, said attor-

26 neys or their substitutes shall lawfully do or cause to be done by virtue hereof.

In witness whereof, we have hereunto set our hand and seal the 8th day of October, A. D., 1921.

KATHERINE J. WELLS.
FLORENCE W. LAW.
DANIEL WELLS.
EDNA W. WALSH.

Subscribed and sworn to before me a notary public in and for the county of Menominee, Michigan.

ERNEST A. McCUE,
Notary Public, Menominee County, Mich.

My commission expires June 17, 1925.

I hereby certify the foregoing to be a true copy of power of attorney executed by Katherine J. Wells, Florence W. Law, Daniel Wells, and Edna W. Walsh.

[SEAL.] (S.) ERNEST A. MCCUE,
Notary Public, Menominee County, Mich.

My commission expires June 17, 1925.

27 II. *General traverse*

Filed Sept. 12, 1927.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

HERMAN J. GALLOWAY,
Assistant Attorney General.

D. E. K.

III. *Argument and submission of case*

On February 17, 1930, this case was argued and submitted on merits by Mr. W. W. Spalding, for plaintiffs, and by Mr. William T. Sabine, for defendant.

28 IV. *Special findings of fact, conclusion of law, and opinion of the court by Williams, J.*

Filed April 7, 1930

Mr. W. W. Spalding for plaintiff. Mason, Spalding & McAtee, were on the brief.

Mr. Wm. T. Sabine, jr., with whom was Mr. Assistant Attorney General Herman J. Galloway, for the defendant. Mr. Fred K. Dyar was on the brief.

The sole question to be determined by the court in this case is whether or not transfers by gift made by a decedent within two years prior to his death, of his property, are transfers of property in contemplation of death within the meaning of the revenue act of 1918. (40 Stat. 1057.)

This case having been heard by the Court of Claims, the court, upon the report of a commissioner and the evidence, makes the following

SPECIAL FINDINGS OF FACT

1. Plaintiffs are the duly appointed, qualified, and acting executors of the estate of John W. Wells, deceased.

2. Said John W. Wells, a resident of Menominee, Michigan, died at the Presbyterian Hospital, Chicago, Illinois, on August 17, 1921, at the age of 73 years and 5 months, following an operation decided

upon as an extreme effort to save him from death resulting from ulcerative colitis. Dr. Ralph Brown, an attendant physician at the Presbyterian Hospital, had been treating him for the disease. On August 17th, the day of decedent's death, Dr. Brown signed decedent's death certificate. The original certificate is filed with the department of health, bureau of vital statistics, Chicago, Illinois, dated August 17, 1921. In the certificate he certified that the cause of Mr. Wells' death was suppurative colitis and that its duration had been one year.

3. Decedent left surviving him a widow, Katherine Wells (who was his second wife, but who died before the institution of this action) and five children by his first wife, viz., Daniel Wells, Artemus C. Wells, Ralph W. Wells, Mrs. Florence Law, and Mrs. Edna Walsh. While still a young man the decedent moved from Iowa to Michigan, where he became interested in the business of acquiring and selling timber lands and that of manufacturing lumber, businesses in which he continued to the time of his death. His home was at Menominee, Michigan. Many years ago he organized the Girard Lumber Company and the J. W. Wells Lumber Company, of Menominee, Michigan, and became the principal owner of their respective shares of stock. To the management of these companies he devoted the greater part of his business activities.

4. As far back as 1901 the decedent began the making of advancements of money or other property to his children. He kept a set of books on which he charged to the several children some, but not all, of the amounts transferred to them. These books of account, which are wholly in the decedent's handwriting, record many items of varying amounts—from a dollar or two to more than thirty thousand dollars—to represent advancements by the decedent to his children in 1901 and subsequent years. On the credit side of the several accounts of the children were entered repayments by them to him.

For a considerable period of time the decedent was engaged in the lumber business with the late Senator Isaac Stephenson, who died in or about the year 1918. It appears that Mr. Stephenson's policy in the matter of gifts or advancements to his children was not so liberal as that of the decedent. About the time of Mr. Stephenson's death this subject was discussed by the decedent with business associates. The decedent expressed it as his opinion that the proper thing for a man of wealth to do was to give his children substantial sums of money during his lifetime while he could advise with them as to its proper use. He further expressed the opinion that some wealthy men who had recently died leaving estates had made a great mistake, and informed his friend Blom, "I am making distribution from time to time of part of my property to see what my children will do during my lifetime, and I will then know when my time is up what I ought to do with the balance."

He frequently expressed his opinion that his friend, Senator Stephenson, had made a big mistake in not distributing his property to his children while he was alive to help them handle it properly and said "that is not my policy."

5. On May 28, 1918, Mr. Wells, the decedent, went for the first time to the Presbyterian Hospital in Chicago to be treated for asthma, and remained there eleven days until June 8, 1918. The hospital records show that at that time he gave the following history of his asthmatic disease:

"About four years ago I began to have attacks (lasting from two to ten days) of dyspnoea, especially at night. Would have to sit up to breathe. (Would fill up, if he would lie.) Expectorate considerable quantities thick mucus, greyish or yellowish. 'Seems to come up from lungs.' Says that at onset it seemed more like cold in the head. Was operated; had part of turbinate removed and then felt better for about one and one-half years. Lately has been having more trouble; coughs a good deal. Attacks are more frequent and come on with slight colds."

6. Mrs. Florence W. Law, one of decedent's daughters, testified that decedent's father died in the Civil War; that he was injured in the Civil War. The records of the Presbyterian Hospital, however, show that decedent, himself, in giving his family history on May 28, 1918, told the hospital authorities that his father had "died of chronic dysentery." With the exception of his father the decedent's family appears to be a long-lived one.

7. In 1918, the decedent advanced to three of his children, Ralph, Mrs. Walsh, and Mrs. Law, certain shares of stock in the Dunbar & Wauzeka Railway Company for which he charged each in the equalization hereinafter mentioned $23,462.

On December 24, 1919, decedent transferred to his son Artemus C. Wells, 343 shares of the stock of the J. W. Wells Lumber Company, and to his son Daniel Wells 73 shares of the stock of the same company. By reason of a stock dividend subsequently declared these 416 shares were increased to 1,280 shares at the date of decedent's death. About a year after these transfers, in the latter part of December, 1920, in the process of equalizing the sums advanced to his children, as hereinafter set forth, he charged his son Artemus with $99,180 and his son Daniel with $19,980 on account of these transfers. Their stipulated aggregate value as of the date of his death was $103,808.

8. About the middle of April, 1920, decedent, while in California, began to be afflicted with ulcerative colitis. This disease is "a condition in which the large intestine becomes inflamed. It involves chiefly the mucous membrane lining of the bowel. Ulceration occurs, quantities of pus and blood are poured out, usually fever, usually more or less abdominal pain, and loss of weight. It is what the layman refers to as dysentery—one form of dysentery." It is a curable disease. About eighty to eighty-five per cent of the cases are cured.

9. In June, 1920, decedent had been advised by physicians in California that he was suffering from cancer of the intestines. Early in the following July decedent left California and, with his wife, went to Chicago, Illinois, where, upon their arrival on July 9, 1920, they were met at the train by his son, Artemus, and his friend, M. B. Lloyd. They all went together to the Presbyterian Hospital. At the hospital decedent was examined by Dr. Ralph Brown, a specialist in bowel disease. Dr. Brown diagnosed the case as ulcerative colitis and explained to decedent in detail the nature of his ailment. Dr. Brown, reading in part from the hospital record, described his condition, as follows:

"Three months prior to his coming for advice on the 9th of July, 1920, he began having diarrhea, resulting from what he believed to be ptomaine poisoning. One evening for dinner—I am quoting from the hospital records written at the time of his admission—he ate what he believed to be some meat that may not have been untainted, and two hours later became nauseated, vomited, and had abdominal pains. This was immediately followed by the diarrhea, which continued up to the time that I saw him, three months later. The examination disclosed the presence of pus, blood, and mucous in his diarrheal bowel movements; and upon the direct examination of the bowel from below, using what is known as a proctoscope it was possible to see that the lining of the bowel was diseased, there being a diffuse, acute inflammation of the bowel."

31 After reading from the record the doctor then testified:

"A diagnosis of ulcerated colitis was made. Mr. Wells was put under appropriate treatment, remained in the hospital from the 9th of July until the 22nd of September, and left the hospital greatly improved, the improvement in the condition being not a matter of theoretical assumption, but proven by the clearing up of pus, blood, and mucous in the stools; and upon direct inspection of the mucous membrane of the bowel by a proctoscope, as my records here before me show, the inflammatory condition had almost entirely cleared up."

10. Dr. Brown, between July and September, 1920, explained the nature of his ailment in detail. He told decedent—

"That he had an ulcerative colitis, the nature of which I explained to him as an infection of the wall of the large intestine, involving the entire extent, probably, of the large intestine of what we speak of as a diffuse process. In other words, one not localized to a small area in the bowel wall, but involving the entire extent of the large bowel, and causing redness, swelling, and ulceration of the lining of the bowel, with the pouring out of pus and blood and dysenterylike process."

According to the doctor, decedent "must have known it was a form of dysentery, because he actually had dysentery. Any layman would know he had dysentery. He was having eight, ten, or twelve bowel movements a day."

Dr. Brown told decedent "he would get well."

The treatment for ulcerative colitis is—

"Complete rest in bed, a very bland type of diet and heat on abdomen, certain drugs which have a soothing effect upon the bowel, and also certain other drugs which we introduce into the bowel in enemas, designed to affect the infection existing in the bowel causing the inflammation."

11. Shortly after the decedent entered the Presbyterian Hospital his business associate, Marshall B. Lloyd, asked him if he had made any arrangements or signed any documents or agreements with his second wife, Katherine Wells, with reference to the division of the property after his death. Decedent said that he had no such agreement but that he was leaving $100,000 in money to his second wife by his will. He told Mr. Lloyd to have the agreement drawn up. The agreement was drawn by Mr. Isaac B. Lipson, an attorney in Chicago; and, though it is undated except for the year 1920, it was executed at the hospital between July 9 and September 22, 1920. This agreement was made between John W. Wells and Katherine Wells and opens with the recital:

"By reason of the illness of John W. Wells the parties desire to make an agreement with respect to the inheritance of Katherine Wells from her husband and her share in his estate; that the parties are agreed that Katherine Wells should have $100,000 in money and certain other property in lieu of her statutory and dower rights."

By the agreement Katherine Wells, decedent's wife, ratified all gifts theretofore made by the decedent to his children and all gifts which might be made to his children thereafter "and before his death whether any of such gifts be made in contemplation of his death, or otherwise."

32 12. The postnuptial agreement between the decedent and his wife contained this further provision:

"And the said John W. Wells agrees and contracts with the said Katherine Wells to make, execute, and leave a last will and testament providing for the said Katherine Wells in accordance with the foregoing agreement."

In carrying out this provision, Mr. Lloyd again acted for the decedent. He (Lloyd) gave Mr. Lipson the provisions to be incorporated in the decedent's will, exhibiting to him also a will previously made by the decedent. The provisions of the new will differed only slightly from those of the earlier will. This will so drafted by Mr. Lipson was signed by the decedent in the presence of witnesses on August 18, 1920. A copy of it is made an exhibit to the petition in this case. After providing for the payment of $100,000 to his widow, granting her the use of the family homestead for her life, and bequathing to her certain personal property, the decedent devised his residuary estate to his five children with the following proviso:

"Provided, however, that the amounts shown to be due me from each of my children severally in accordance with my books at the time of my death, shall be considered advancement made by me to

them from time to time and shall be chargeable to each of them severally as advancements and shall be deducted from their respective shares."

13. On September 14, 1920, decedent, while at the hospital wrote to his son Ralph W. Wells, who was in England:

"The doctors say that I will be absolutely cured if I am careful for two or three months after leaving and I certainly will be careful after this."

On September 16, 1920, Dr. Shambaugh, according to the hospital record, found "very marked evidence of hyperplastic ethmoiditis, sinusis sinophisi, and concluded—

"There is very likely a close relationship between the ethmoiditis in this case and the asthma."

Owing to the age of the patient, Dr. Shambaugh did not feel like urging an operation. Ethmoiditis is an inflammation of the ethmoid cells which are connected with the nasal cavity.

14. On September 22, 1920, decedent was discharged from the Presbyterian hospital in an improved condition, and, according to Dr. Brown, decedent's condition was "excellent," though he had "not fully at that time recovered but he did within the next two or three months." When decedent left the hospital on September 22, 1920, according to Dr. Brown:

"His appearance was normal; he had gained an appreciable amount of weight, which is also a matter of record here, and he was in a very fair state of health."

15. At the time decedent returned to his home in Menominee on September 22, 1920, he had been almost nine months since January 4, 1920, during which time he had been in Florida, California, and the hospital in Chicago. During this nine-month period of absence his son Artemus had had, as in decedent's many extended absences in the past, full charge of the management of the business of J. W. Wells Lumber Company. In fact, in December, 1919, he had then been in active control of that company for quite a while.

22 The morning he returned he went into the office of his son, Artemus Wells, sat down in a chair, and told his son he was completely cured of the trouble that he had had and he felt good, but said he was going to be careful of what he ate.

16. After his return decedent resumed his normal business activities; viz, the management of the business of the J. W. Wells Lumber Company and other business affairs in which he was interested. His activities in the several companies in which he was interested continued up to the time of his death.

He was up at the office every day, around about the plant, doing about what he always did around there, attending to his correspondence, and such work.

These continued until he went away to California on February 3, 1921.

Decedent had been accustomed to spending the summers in Menominee and traveling in the winters during the latter years of his

life. He was usually in Menominee from about the first of May to the Christmas holidays. Decedent, for many years prior to his death, had a penchant for traveling. He visited not only many places of interest in this country, but also made several trips to foreign countries, including the Orient. In 1918 he acquired a cottage in California near Los Angeles, which he visited in the winters of 1918–1919, 1919–1920, and 1920–1921, remaining there several months on each occasion.

17. On October 30, 1920, decedent wrote his son Ralph W. Wells, who was then in England, in part as follows:

"I am around about the same as usual. Went to Iron Mountains to see Wells Hallenbeck day before yesterday, from there next day to Dunbar and on home. I feel as well as ever, and bowels seem normal, but doctor says I must diet and take Bismuth medicine for awhile and be careful. Gained 6 pounds since I came home. Wells Hallenbeck may have diabetes, and has taken Charles Wells as assistant, and will go to hospital. He can't sleep more than two or three hours at night, and is very nervous, has lost a good deal in weight."

18. The decedent was again admitted to the Presbyterian Hospital in Chicago for the third time on November 30, 1920. He did not tell his son, Artemus, that he was going again to the Presbyterian Hospital in Chicago for ten days on November 29, 1920, nor later when he went there again for four days on January 10, 1921. This third visit to the hospital was for the purpose of an operation to relieve his asthma. When Dr. Brown saw him again on November 30, 1920—

"He was in good general condition, except for some recurrence of trouble with his asthma, and he came to the hospital for treatment of the asthma, not for the bowel trouble. In fact, it was by arrangement when he left the hospital in September that he came back at this time, in November, to have the operative work done on the nose that was designed to clear up the asthma."

On November 30, 1920, an operation was performed by Dr. Shambaugh, which is described as a submucous resection of the deflected nasal septum, followed by complete exenteration (scraping out of the cells) of the ethmoid on the left side. On December 1, 1920, the hospital records show the doctor's medicine orders were as follows:

34 "Sodium bromide, grains, 10; potassium iodide, grains, 5; four times daily. Calcium phosphate, calcium carbonate, and bismuth subnitrate, each, grains, 20; five times daily."

Bismuth subnitrate is a part of the powder given for an irritable condition of the bowel. The doctor's order was "rest in bed," P. R. N. (meaning "when necessary"). Heat to abdomen, P. R. N., every alternate hour if in distress. On December 1, 1920, the record shows that the bowel movement contained some blood by delicate chemical tests, but no visible blood. It also shows that, on December 8, 1920, at 11.30 p. m., decedent had an asthmatic attack. On December 9,

1920, decedent was discharged from the hospital and returned to Menominee.

19. In December, 1920, the decedent spent considerable time working on his books of account. The books were kept at the offices of the J. W. Wells Lumber Company, at Menominee, Michigan. The decedent was preparing the necessary figures for the final equalization of the advancements he had made to his children from time to time during prior years.

On December 31, 1920, decedent came into the office of his son Artemus (which was also at the offices of the lumber company) with some stock certificates in his hand. These certificates, dated December 31, 1920, effectuated the transfer by him of 68,985 shares of the Girard Lumber Company to his children. The value of these shares at the date of decedent's death was $344,925. The son Artemus was secretary of this company and his father asked him to sign the certificates in that capacity. Thereupon the son signed the certificates and the transfers were completed immediately thereafter. On the occasion just mentioned the decedent also had in his hand several penciled statements of his accounts with his children. These were in the decedent's handwriting. They contained summaries of his accounts with each of his children, showing debit balances upon which interest had been computed by the decedent for equalization purposes. The total debit balances due from each of the children, appearing on the summary of these statements, after charging them with their respective shares of the Girard Lumber Company stock, were as follows:

Daniel Wells	$206,530
Artemus C. Wells	231,651
Ralph W. Wells	214,008
Mrs. Florence Law	216,445
Mrs. Edna Walsh	180,662

20. At the bottom of each of the pages on which the foregoing debit balances of the accounts of decedent with his five children are endorsements, all in decedent's handwriting, all dated January 1, 1921, and all signed by him, respectively, as follows:

(1) Account with his son Artemus C. Wells.

"This account is cancelled and the ledger is balanced to date as a gift."

(2) Account with Edna Wells (Mrs. Walsh).

"This account is cancelled and ledger balanced to date as a gift to Edna."

(3) Account with Florence Wells (Mrs. Law).

"This balance is made a gift to Florence and ledger account is balanced to date, $216,445.16."

(4) Account with Ralph W. Wells.

"Gift to Ralph. See adjustment of accounts between all on separate sheets."

(5) Account with Daniel Wells.

"This balance is made a gift to Dan and ledger account is balanced to date."

Shortly thereafter decedent gave to the Corn Exchange National Bank of Chicago a statement of his financial condition as of December 21, 1920, on which he had penned in red ink; "I have made presents to my family of large amounts of stocks and cash for several years. J. W. Wells." In this statement the stocks transferred to his children on December 31, 1920, are not included.

21. On January 10, 1921, decedent returned for the fourth time to the Presbyterian Hospital in Chicago. Dr. Brown saw decedent on that day and made this entry on the hospital record with reference to his condition:

"In general feels very well. Gained six pounds in weight. Asthma has been somewhat troublesome at times. Has had very good bowel function. No pain. Returns for completion of nasal operation."

The hospital record of his ailment at that time reads:

"Chronic ethmoiditis, chronic asthma; results, improved."

Ethmoiditis is an inflammation of the ethmoid cells which are connected with the nasal cavity.

On January 10, 1921, the hospital record also shows that the doctor's diet order was bland diet plus potatoes, vegetables, purees, oranges, and grape fruit. The orders for medicine for the decedent were "calcium carbonate, calcium phosphate, bismuth, subnitrate, each grains 20, five times daily. Adrenalin minims 10 * * * hypo for asthmatic attack." The calcium carbonate and calcium phosphate and bismuth subnitrate were for the bowels.

On January 11, 1921, Dr. Shambaugh again operated on decedent, the entry on the hospital record being: "Exenteration of ethmoid labyrinth, using Hartman biting forceps." That is an operation on the ethmoid cells. The doctor scraped the mucous membrane just back of the root of the nose in the forward part of the floor of the cranium. The hospital record also shows under date of January 10, 1921, that decedent's "asthma has been somewhat troublesome at times" and under date of January 13, 1921, the nurse's record shows: "1.30 a. m., usual asthmatic attack, unable to sleep." On the following morning, January 14, 1921, at 2.30 a. m., the nurse's record shows "usual asthmatic attack, adrenalin minims 10, hypo given with relief."

The hospital record shows that on January 14, 1921, there was "a small amount of mucous with blood in the stool." Dr. Brown examined decedent on that day and found "a very greatly improved condition" and that in respect of the ulcerative colitis it was "90 per cent normal." The decedent was discharged on January 14, 1921, with instructions to resume a blood builder and to keep up the former bland type of diet for the benefit of the intestines.

22. In the process of equalizing as of January 1, 1921, the advancements made to his children, the decedent had charged each of
36 his children with shares of the capital stock of the Lloyd Manufacturing Company, a Michigan corporation, as follows:

	Shares
Daniel Wells	228
Artemus C. Wells	576
Ralph W. Wells	750
Mrs. Walsh	1,086
Mrs. Law	818

These shares, however, were not delivered to the children, as it appears that the decedent had agreed to exchange them for a like number of shares of the capital stock of the Heywood-Wakefield Company, if, as, and when the Lloyd Company should be merged with the Heywood Brothers and Wakefield Company, also a New Jersey corporation, the resulting corporation to be known as the Heywood-Wakefield Company. Marshall B. Lloyd was interested with the decedent in the Lloyd Company.

23. On January 26, 1921, decedent entered into a trust agreement with Marshall B. Lloyd, of Menominee, Michigan, as trustee, for the benefit of his wife and five children, by which he transferred to him as trustee 3,713 shares of the capital stock of the Lloyd Manufacturing Company and at the same time delivered to him, assigned in blank, the certificates for said shares, which the trustee agreed should be transferred upon the books of the company to the name of "Marshall B. Lloyd, as trustee for the beneficiaries of J. W. Wells (his wife and five children) under a trust agreement dated January 26, 1921." (These shares were of the stipulated value of $334,170, as of the date of decedent's death.) The trustee was authorized to exchange for each share of the outstanding common stock of the Lloyd Manufacturing Company one share, par value $100, of the second preferred stock of a Massachusetts corporation to be organized and to assign, transfer, and deliver the certificates of the Lloyd Company to the Massachusetts corporation or its nominee and to accept certificates of the latter to be issued in exchange. (The corporation was organized as the Heywood-Wakefield Company.) The agreement further provided that within sixty days after the delivery to the trustee of the second preferred stock of the Massachusetts corporation in exchange for the shares of the Lloyd Manufacturing Company, held by him as trustee, the trustee should assign and deliver the shares of the second preferred stock of the Massachusetts corporation so received by him to decedent's beneficiaries, as follows: Florence Law (his daughter), 818 shares; A. C. Wells (his son), 576 shares; Daniel Wells (his son), 228 shares; Edna E. Walsh (his daughter), 1,086 shares; Ralph Wells (his son), 750 shares; and Katherine E. Wells (his wife), 255 shares. The agreement further provided that in the event the exchange of shares should not be consummated before December 1, 1921, the trustee should thereupon assign and deliver the shares of the common stock of the Lloyd Manufacturing Company held by him as trustee to the beneficiaries of the decedent, as follows:

To Florence A. Law, 818 shares; to A. C. Wells, 576 shares; to Daniel Wells, 228 shares; to Edna E. Walsh, 1,086 shares; to Ralph

W. Wells, 750 shares; and to Katherine E. Wells, 255 shares, of such capital stock.

37 24. On January 26, 1921, the same date as the trust agreement, decedent wrote to his son Ralph, then in England, in part as follows:

"Dick McLean died about three weeks ago. I think that if he had taken care of himself and dieted carefully that he might have lived for some time * * *.

"Farmlof, the builder, died from an operation lately. The doctors pronounce me cured of bowel trouble, but I will always have asthma. I weigh 140 stripped. Enough. We leave for West on 29th.

"Weather mild right along. Ice is drifting around bay.

"I am going to divide Lloyd pref. stock and most of G. L. Co. (Girard Lumber Co.) among you children at once so you will have enough to keep you from hunger at least. I own now 5,102 Lloyd stock, $100 per share. Income, $35,721. I am going to even up my gifts to all now, and the following is the way they stand before evening up:

Art	$231,651
Dan	299,539
Edna	180,662
Florence	207,445
Ralph	175,356
	1,093,644

"I have charged all of you interest on your accounts at 5% and I have charged you and Art $50,000 apiece for motor loss and credit you for W. P. L. Co. stock charged you.

"I am mighty busy getting ready for the West, so good-by."

25. On February 3, 1921, decedent left for California. Before leaving he wrote his daughter Edna Walsh, as follows:

MENOMINEE, MICH., *Feby. 3, 1921.*

MY DEAR EDNA: We leave to-day for sunny California, although Cal. has nothing on Menominee this far.

I have been working on my books and evening up all your accounts. Dan, Art, and Ralph have had advances that were more than you and Florence had and I have equalized one with the other by charging each with what they have had and charging them interest on the account to date, and the inclosed sheet shows what each has had, and how I equalized your a/cs by giving stock to even.

Your Lloyd stock will be delivered as soon as the deal is closed, which will be very soon. Your Lloyd stock is worth $108,000 and the Girard stock is worth $252,000, so you need not take in washing for support unless you throw it away on copper or other junk.

In making out these accounts, the thing that seems most important is how interest runs up. Good safe bonds are the best investment for a person who does not understand business.

Well, my dear girl, take good care of this, remember the poor and needy, and you will receive your reward.

Good-by.

FATHER.

On February 3 or 4, 1921, Dr. Brown saw decedent on his way to California, and described his condition as follows:

"He was vigorous and had an excellent color. He was having, and had had for months then, a normal bowel functioning. He was eating everything and, with the exception of the fact that his
38 asthma had at that time not entirely cleared up, he considered himself well, and I told him that he need have no anxiety whatever about his state of health; that I considered him in excellent condition; that he need have no fears of any recurrence of the ulcerated colitis. As a matter of fact, my statement to him was justified by the fact that since he had left the hospital the preceding September, a matter of practically four months, he had enjoyed as normal a bowel function, I suppose, as the average man."

26. Some time in February, 1921, James A. Hamilton, manager of the Hamilton Machinery Company, of Menominee, and his wife were in Los Angeles, California. He had known decedent since 1899. While at Los Angeles he saw the decedent six times and spent three days with him. They had dinner at decedent's residence. Decedent took them in his automobile all around the city, and on Saturday, February 19, 1921, took them in his car up in the mountains. They would start at nine or ten in the morning, have lunch at some place at two or three o'clock, and return about five o'clock. Decedent drove the car himself through the congested portion of the city, as well as around or over the mountains near that city. At places on these mountain roads the automobile party driven by the decedent traversed roads that ran along a precipice where there is a sheer fall of six or seven thousand feet without any apparent concern or distress on the part of decedent. Hamilton did not see any difference in his (decedent's) appearance. He seemed to be just as spry as he ever was, and handled the car in pretty good shape. Hamilton also thought he was very cheerful.

27. In a letter dated February 21, 1921, written at Los Angeles, California, addressed to "My dear children," decedent wrote in part as follows:

"We had Ed Lindsly and Maud, and Mrs. Blesch and sister to dinner last week, and hardly a day goes by without some Menominee people call. I took Jim Hamilton and wife out on a mountain drive Saturday. We were over to see the Saffords yesterday. They leave for San Diego to-day and will stay until they sail for France in May. * * *

"I suppose you know that Ed Daniell had cancer in the jaw or neck. I heard to-day that the doctors pronounce him cured, which seems to be too good to be true, and seems to be too early to be sure, especially when it is in such a vital place. I am about free of my

bowel trouble, but have my old complaint, asthma, but I have taken treatment at Batch Creek Treatment Rooms here the last two years and they have cleared it up and they are now treating me and it is clearing up."

28. On April 6, 1921, Lloyd, the trustee, under the trust agreement of January 26, 1921, distributed to decedent's children and decedent's wife certificates for the shares of stock in the Heywood-Wakefield Company to which they were respectively entitled. The equalization of decedent's gifts to his children was thus completed by these transfers on that day, though decedent had actually divested himself of all interest in the 3,713 shares of Lloyd Manufacturing Company stock when he transferred them on January 26, 1921, to Lloyd as trustee under the trust agreement of that date. The stipulated value of the stock so transferred by decedent to his wife and children as of the date of decedent's death is $334,170.

39 29. While in California, about the middle of April, 1921, the decedent had a recurrence of the ulcerative colitis. He consulted Dr. Fred Speik, an outstanding man in internal medicine in Los Angeles, California, who had been previously associated with Dr. Ralph Brown. Dr. Speik considered the process an ulcerative colitis, and so treated him for some weeks. Because Mr. Wells was not doing well under his treatment he finally X-rayed his bowel, and told Mr. Wells that he feared he might have a cancer, and advised an operation, whereupon Mr. Wells telegraphed Dr. Brown that he was coming at once to Chicago, and this he proceeded to do, bringing these X-ray films with him.

30. On June 5, 1921, decedent reentered the Presbyterian Hospital in Chicago for the fifth time. "At the time of his arrival * * * he was a pretty sick man. He was having a terrific dysentery."

The condition proved to be due to a very virulent form of an infection that did not yield to treatment. Finally it became apparent that the best hope for saving his life would be to perform a simple operation, designed to prevent bowel material from flowing through the large intestine over this ulcerated surface. The operation was performed on the 10th of August, 1921, by Dr. Arthur D. Bevan.

Decedent continued to lose ground and died on the 17th of August, 1921. The decedent died as a result of an infection of the large intestine, producing what we call ulcerated colitis, death resulting from the combined effects of the sepsis and the exhaustion incident to the terrific dysentery. On the day of decedent's death an autopsy was performed which disclosed the characteristic findings that had been diagnosed during life, namely, a very severe and extensive inflammation of the large intestine, with ulceration of the bowel. No trace of cancer was found.

31. The death certificate signed by Dr. R. C. Brown on August 17, 1921, and on the same day filed with the Chicago Department of Health, sets forth the cause of decedent's death as "suppurative colitis" and its "duration 1 yr."

32. After the death of the decedent, plaintiffs as executors of his estate filed with the Bureau of Internal Revenue the estate-tax return of his estate wherein they reported a net estate, for Federal estate-tax purposes, of $883,485.08. It was shown in the return that certain transfers had been made by the decedent to his children, within two years of his death, but the property so transferred was not included in the taxable estate because the executors claimed in the return that the transfers were not made in contemplation of death. This estate-tax return was audited by the Bureau of Internal Revenue and several determinations, tentative and final, were made by the bureau of the estate-tax liability of the decedent's estate. The final determination of the Bureau of Internal Revenue was that there should be included in the estate subject to the estate tax the following shares of stock of the values stated below, transferred by the decedent to his children, within two years of his death, because of the determination by the bureau that these transfers were made by the decedent in contemplation of death:

1,220 shares of the capital stock of the J. W. Wells Lumber Co	$103,808
68,985 shares of capital stock of the Girard Lumber Co	344,925
3,713 shares of the capital stock of the Heywood-Wakefield Co	334,170
Total	782,903

40 Such determination having been made, the Bureau of Internal Revenue, shortly after September 29, 1923, assessed additional estate taxes against plaintiffs in the amount, as finally reduced, of $83,410.90. This amount, with interest of $4,842.47, total $88,253.37, was paid by the executors to the collector of internal revenue on May 28, 1924. The basis of such additional taxes was the determination by the Bureau of Internal Revenue that the decedent had on December 24, 1919, and January 1 and 29, 1921, transferred the shares of stock listed above, of the aggregate value of $782,903, to his children and wife in contemplation of death.

33. On July 2, 1924, plaintiffs filed with the collector of internal revenue their refund claim for $88,253.37, wherein they sought the refunding of the additional estate taxes with interest paid to the collector of internal revenue as stated in the next preceding finding. The basis or ground set forth in the refund claim was that the Bureau of Internal Revenue had erred in holding that the transfers in question were made in contemplation of death and were therefore properly to be included in the taxable estate. Upon audit, plaintiffs' refund claim, on October 18, 1924, was allowed in the amount of $4,616.15 (due to an adjustment not material here), and rejected in the amount of $83,688.62. In his letter of rejection the Acting Commissioner of Internal Revenue ruled that "the transfers were made in contemplation of death and were properly included as a part of decedent's gross estate, and no further adjustment thereof is herein made." The total taxable estate of the decedent, as found by the Bureau of Internal Revenue in its final determination, was $1,664,217.61, which included $782,903, the value of the

above-mentioned shares of stock transferred by the decedent to his children.

34. Plaintiffs are the duly appointed, qualified, and acting executors of the estate of John W. Wells, deceased. Plaintiffs and their decedent are and have always been citizens and residents of the United States. They and their decedent have always borne true faith and allegiance to the Government of the United States and have in no way aided, abetted, or given encouragement to rebellion against said Government. Plaintiffs are and have at all times here involved been the sole and absolute owners of the claim presented in this action, and have made no transfer or assignment of said claim, or any part thereof, or of any interest therein. There are no set-offs or counter-claims against the same in favor of the United States. No action has been had on said claim in Congress or by any of the departments of the United States Government except by the Bureau of Internal Revenue as hereinbefore stated.

35. The transfers, made within two years of decedent's death, upon which the tax involved in this action was imposed, were made by decedent as follows:

In December, 1919, he transferred and delivered to his sons, Daniel Wells and Artemus C. Wells, 416 shares of the capital stock of the J. W. Wells Lumber Company. By reason of a stock dividend subsequently declared, these shares were increased to 1,280 shares at the date of the decedent's death. Their stipulated value is $103,808.

41 On January 1, 1921, he transferred and delivered to his children 68,985 shares of the Girard Lumber Company of the agreed value of $344,925.

On January 26, 1921, he placed in trust 3,713 shares of the capital stock of the Lloyd Manufacturing Company, to the end that this stock might be exchanged for stock of the Heywood-Wakefield Company and then that the Heywood-Wakefield shares received in exchange might be delivered to his children. The agreed value of this stock was $334,170.

36. The value of decedent's estate at the time of his death, excluding the value of the transfers above mentioned, was $881,314.61, on which the decedent's annual income was approximately $50,000 per annum. The total value of the shares, transferred as above mentioned in Finding 35, aggregated $782,903. The transfers were of a material part of decedent's property.

Conclusion of law

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides as a conclusion of law that the plaintiffs are entitled to recover the sum of $83,683.62, with interest as provided by law.

It is therefore adjudged and ordered that the plaintiffs recover of and from the United States the sum of eighty-three thousand six

hundred eighty-three dollars and sixty-two cents ($83,683.62), with interest at the rate of six per cent per annum from May 28, 1924, to such date as the Commissioner of Internal Revenue may determine, in accordance with the provisions of subsection (b), section 177 of the Judicial Code, being a part of the revenue act of May, 1928.

Opinion

WILLIAMS, Judge, delivered the opinion of the court:

This is a suit brought by the executors of the estate of John W. Wells, deceased, to recover the sum of $83,683.62, with interest thereon, which amount, it is alleged, was illegally assessed and collected as Federal estate taxes by the Commissioner of Internal Revenue under the revenue act of 1918.

The decedent was a resident of the State of Michigan. He was a man of strong character who had by his own efforts and industry accumulated a considerable fortune. When a young man he moved from Iowa to Michigan, where he became interested in the business of acquiring and selling timber lands and manufacturing lumber, in which business he continued up until the time of his death and out of which he accumulated his fortune.

The decedent was the father of five children, three sons and two daughters, who survived him. In 1901 he began to make advancements of money and other property to his children. He kept a set of books in which the transfers of property and money to his children were recorded.

The decedent often expressed the opinion that the proper thing for a man of wealth to do was to give his children substantial sums of money while he was yet living that they might have the
42 experience in handling it while they had a father to counsel with and give advice.

The decedent and the late Senator Stephenson, of Wisconsin, who died about the year 1918, were associated together in the lumber business and were close friends. It seems that Senator Stephenson was not so liberal in the matter of making gifts to his children as was the decedent. Decedent often discussed the policy pursued by Senator Stephenson with this children and expressed the opinion that he was making a great mistake in not giving property to his children while he was living to help them handle it properly and said, "That is not my policy."

Between the time decedent began making advancements to his children in 1901 and the date of his death, August 17, 1921, he had transferred to them in money and property, including interest accrued on such gifts, $1,397,814. Of this amount $782,903 had been transferred within two years prior to his death as follows:

(1) In December, 1919, he transferred and delivered to his sons, Daniel Wells and Artemus C. Wells, 416 shares of the capital stock of the J. W. Wells Lumber Company. By reason of a stock dividend, subsequently declared, these shares were increased to 1,280

shares at the date of decedent's death. Their stipulated value is $100,800.

(2) On January 1, 1921, he transferred and delivered to his children 68,985 shares of the Girard Lumber Company of the agreed value of $344,925.

(3) On January 26, 1921, he placed in trust 3,713 shares of the capital stock of the Lloyd Manufacturing Company to the end that this stock might be exchanged for stock in the Heywood-Wakefield Company and then the Heywood-Wakefield shares received might be delivered to his wife and children. The agreed value of the property transferred as aforesaid is $782,903.

After the death of decedent the plaintiffs as executors of his estate filed with the Bureau of Internal Revenue an estate tax return wherein the shares of stock transferred as aforesaid were not included in the net estate subject to Federal estate taxes. Upon an audit of the return by the bureau the commissioner determined and held that the shares of stock so transferred, within two years prior to the death of decedent, were transfers in contemplation of death and were subject to the tax. Consequently $782,903, the value of said stocks, was added to the taxable estate, upon which plaintiff paid an additional tax in the amount of $83,693.62, which tax is the basis of this suit.

The taxes in question were assessed under the revenue act of 1918. The relevant part of which provides as follows:

"Sec. 401. That * * * a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this act. * * *

"Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated * * *.

43 "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

The gifts in question were undoubtedly a material part of decedent's property and were in the nature of a final distribution or disposition of such property, without a fair consideration in money or money's worth, and having been made within two years prior to

decedent's death, a presumption arises under the statute that such gifts were made in contemplation of death. The presumption created is one of fact, to overcome which the burden of proof is on the plaintiff.

The words "contemplation of death," have been construed many times in both State and Federal courts and have come to have a distinctive meaning. In Spreckles v. State, 30 Cal. App. 363, 158 P. 349, the court said:

"A reasonable and just view of the law in question is that it is only where the transfer of property by gift is immediately and directly prompted by the expectation of death, that the property so transferred becomes amenable to the burden, or, as counsel for the respondents with singular aptness states the proposition: 'It is only when contemplation of death is the motive without which the conveyance would not be made, that a transfer may be subjected to the tax.' That is, the expectation of death must be the direct, specific, and immediate animating cause of the transfer."

In Shwab v. Doyle, 269 Fed. 321, the Circuit Court of Appeals said:

"On principle, and without reference to authority, the ultimate question concerns the motive which actuated the grantor; that is to say, whether or not a specific anticipation or expectation of her own death, immediate or near at hand (as distinguished from the general and universal expectation of death some time), was the immediately moving cause of the transfer."

This court in the case of Meyer v. United States, 60 C. Cls. 474, construed the words "contemplation of death" as follows:

"A review of the authorities is scarcely necessary to sustain the proposition that the contemplation of death referred to in the statute is not that contemplation of death which must be present with all of us, mindful of its certainty at some time, we know not when, but it is that state of mind which by reason of advanced age, serious illness, or other producing cause induces the conviction that death in the near future is to be anticipated. If it be said that there need not be a conviction that death is imminent, there must at least be a belief that it is to be expected in the very near future rather than in the usual course of events. And in this state of mind, in this belief in the near approach of death, must be found the motive for the conveyance if it is properly to be characterized as made in the contemplation of death.

"The question necessarily involves the determination of a mental state, and that, too, the mental state at a given time of one who, at the time the question is for determination, has passed from life. The difficulties are therefore apparent. In the absence of proof as to express declarations of the decedent—seldom, we may assume, available to the Government—the burden of affirmative proof could but rarely, if ever, be successfully assumed; and wisely, therefore, and perhaps of necessity also, the law has relieved the Government,

under the condition stated, of the burden and created the presumption.

"But what is the result? Can it go further than to shift the burden of proof, leaving the presumption to prevail in the Government's favor in the absence of a reasonable showing to the contrary? Taxing statutes, when of doubtful interpretation, are always to be construed in favor of the taxpayer, and the spirit of this rule must be completely ignored if, in determining a question of fact as between the Government and the taxpayer, rigorous rules as to the proof required to overcome the presumption of the law are to be applied. For if the Government was deemed entitled to a presumption in its favor because of the difficulties of proof, it is to be borne in mind that even though a conveyance was in fact not in any degree made in contemplation of death, the personal representatives might and frequently would be beset by many difficulties in proving that negative fact. Circumstances must largely be relied upon, and these should be fairly—indeed, we think liberally—construed in favor of the taxpayer."

In Rea v. Heiner, 6 Fed. (2d) 389, 392, the court said:

"There is a common agreement that the words 'contemplation of death' mean not the general knowledge of all men that they must die; that it must be a present apprehension, from some existing bodily or mental condition or impending peril, creating a reasonable fear that death is near at hand; and that, so arising, it must be the direct and animating cause, and the only cause, of the transfer. If this apprehension, so arising, is absent, there is not that contemplation of death intended by the statute, especially when another adequate motive actuating the gift is shown."

The Board of Tax Appeals in Starck, Executor, 3 B. T. A. 514, construed the meaning of the term "contemplation of death" as follows:

"In determining whether a transfer is made in contemplation of death, the board must look to the expressions of the decedent, to the outward visible acts and circumstances surrounding a transfer of property prior to death: * * * An act may well be performed in contemplation of death at some time in the future and yet not be in contemplation of death within the meaning of that phrase as used in the statute. The intention of Congress in the enactment of section 402 of the revenue act of 1918 was to provide for the inclusion in the gross estate of the value of any property concerning which the decedent made a transfer, except for a fair consideration in money or money's worth, in contemplation of death within a reasonable time in the near future, as distinguished from the general expectation of death entertained by everyone."

45 The board has since in a long line of well-considered decisions, too numerous to cite, reaffirmed the rule announced in Starck, Executor, supra, and has uniformly applied such rule to the facts presented in cases arising before it in determining whether or not transfers in question were made in contemplation of death.

The question to be decided is whether or not the presumption raised by the statute that these transfers were made in contemplation of death has been overcome by proof adduced on behalf of plaintiffs. It is our opinion the presumption is overcome as to each of the three transfers, and that the plaintiffs have succeeded in establishing affirmatively and conclusively that such transfers were not made in contemplation of death within the meaning of the statute. We have no difficulty in reaching this conclusion as to the transfer made in December, 1919, in which decedent delivered to his sons, Daniel Wells and Artemus C. Wells, 1,280 shares of the J. W. Wells Lumber Company, of the value of $103,808. At the time this transfer was made the decedent, aside from a case of aggravated asthma from which he had suffered at intervals for three or four years prior thereto, was, so far as he knew, in perfect health. He had not consulted a physician prior to that time for any ailment other than for asthma, which, while annoying, was not regarded by him as at all serious.

His son Artemus had for some time been in the active management of the J. W. Wells Lumber Company and the moving cause for the gift of stock to him was a recognition of the efficient service he had rendered the company and the desire of decedent that he might have a substantial financial interest in the company. The transfer was also made in the furtherance of the policy long adopted by decedent in the matter of making gifts and advancements to his children, which motive will be considered further in discussing the two subsequent transfers. That the decedent at the time of the making of this transfer either anticipated or expected his own death in the immediate or not far distant future is negatived by all the facts and circumstances surrounding the making of the transfer, and by the undisputed proof in the record.

The transfer of the shares of stock of the Girard Lumber Company made on January 1, 1921, and the transfer of the shares of stock of the Lloyd Manufacturing Company, January 26, 1921, were made under different conditions than was the transfer of December, 1919, and present a much closer question.

Decedent spent the latter part of the winter and early spring of 1920 at his winter home in California. About the middle of April he had a severe attack of intestinal trouble. In June of that year his physician in California advised him that he was suffering from cancer of the intestines. Shortly thereafter he left California and went to Chicago, where on July 9th he entered the Presbyterian Hospital. He immediately consulted Dr. Ralph Brown, a specialist in bowel diseases. Dr. Brown diagnosed his case and informed the decedent that his ailment was that of ulcerative colitis, and that he did not have cancer. Dr. Brown further informed him that he would get well. He remained in the hospital from July 10th to September 22d, under the care and treatment of Dr. Brown, at which time he was discharged from the hospital in a greatly improved con-
46 dition. His appearance was normal; he had gained an

appreciable amount in weight, and was advised by Dr. Brown that his condition was excellent.

Upon his discharge from the hospital in September he returned to his home in Michigan; assured his son Artemus Wells, who had been in charge of the J. W. Wells Lumber Company during his absence, that he was completely cured of his trouble and that he felt good, but said that "he was going to be careful of what he ate." He resumed his normal business activities, was at the office of the Wells Lumber Company every day; attended to his correspondence, worked on his books, and was apparently in his usual health. He visited with his friends as usual and made one or two business trips outside the State.

On October 30th he wrote his son Ralph, who was then in England, saying:

"I am around about the same as usual. Went to Iron Mountain to see Wells Hallenbeck day before yesterday, from there next day to Dunbar and on home. I feel as well as ever, and bowels normal, but doctor says I must diet and take Bismuth medicine awhile and be careful. Gained 6 pounds since I came home."

He returned to the Presbyterian Hospital on November 30th and underwent an operation for his asthmatic trouble. Dr. Brown saw him on November 30th and pronounced him in good general condition except for some recurrence of trouble with asthma. He left the hospital December 9, 1920, and returned to his home in Michigan. Following his return home he spent considerable time working on his books of accounts at the J. W. Wells Lumber Company's office. On December 31st he executed the transfer of 68,985 shares of stock of the Girard Lumber Company to his children. His son Artemus was secretary of this company, and when his father asked him to sign the certificates in that capacity in order to effectuate their transfer he demurred, and said to his father: "We have all we need. I don't think I would do that." To which the decedent replied: "Well, I have got all that I need, too, and I want to be relieved of the responsibility of looking after this property, and I think you children should take it up." Artemus thereupon signed the certificates and the transfer was completed. On this occasion the decedent had in his hand several penciled statements of his accounts with his children. These statements were in his own handwriting and contained summaries of his accounts with each of his children showing debit balances upon which interest had been computed by the decedent for equalization purposes. The total debit balances due from each of the children appearing upon the summary of these statements, after charging them with their respective shares of the Girard Lumber Company stock, were as follows:

Daniel Wells	$266,530
Artemus C. Wells	231,651
Ralph Wells	175,356
Edna Walsh	180,662
Florence Law	207,444
	1,063,644

On January 26, 1921, the decedent executed certain trust instruments whereby 3,713 shares of the capital stock of the Lloyd
47 Manufacturing Company were assigned in trust, to be exchanged for an equal number of shares in the Heywood-Wakefield Company, which were in turn to be delivered to his wife and children as follows:

Florence Law (daughter), 818 shares; A. C. Wells (son), 576 shares; Daniel Wells (son), 228 shares; Edna Walsh (daughter), 1,086 shares; Ralph W. Wells (son), 750 shares; and Katherine E. Wells (his wife), 255 shares.

In a letter written to his son Ralph, who was still in England, he explained the transfer and distribution of the Lloyd Manufacturing stock as follows:

"I am going to divide Lloyd pref. stock and most of G. L. Co. (Girard Lumber Co.) among you children at once so you will have enough to keep you from hunger at least. I own now 5,103 Lloyd stock, $100 per share. Income, $35,721. I am going to even up my gifts to all now."

In the same letter the decedent said:

"The doctors pronounce me cured of bowel trouble, but I will always have asthma. I weigh 140 stripped. Enough. We leave for West on 29th: * * * I am mighty busy getting ready for the West, so good-by."

On February 3, 1921, before leaving for California decedent wrote his daughter Edna explaining to her the transfer of the Lloyd stock, as follows:

"I have been working on my books and evening up all your accounts. Dan, Art, and Ralph have had advances that were more than you and Florence had and I have equalized one with the other by charging each with what they have had and charging them interest on the account to date, and the inclosed sheet shows what each has had, and how I equalized your a/cs by giving stocks to even."

The decedent left his home in Michigan on February 3rd or 4th for his winter home in California. He stopped at Chicago on the way and saw Dr. Brown, who described his condition at that time as follows:

"He was vigorous and had an excellent color. He was having, and had had for months then, a normal bowel functioning. He was eating everything and, with the exception of the fact that his asthma had at that time not entirely cleared up, he considered himself well, and I told him that he need have no anxiety whatever about his state of health; that I considered him in excellent condition; that he need have no fears of any recurrence of the ulcerated colitis."

After his return to California the decedent apparently enjoyed his usual health, with the exception of the asthma, until late in the spring. During this time he entertained his friends at his home, took them for automobile rides in the city of Los Angeles and over

the mountain roads near by. His friends who had not seen him for some time saw no difference in his appearance. He seemed to them just as spry as he had ever been. About the middle of April, 1921, he had a recurrence of the ulcerative colitis, which not yielding to treatment, led decedent to return to Chicago and reenter the Presbyterian Hospital on June 5, 1921, where he underwent an operation on August 10th, and died on August 17th.

48 Applying these facts to the rule that the term "contemplation of death" does not mean that general knowledge of all men that they must die, but that there must be a present apprehension, from some existing bodily or mental condition or impending peril, creating a reasonable fear that death is near at hand, and that such reasonable fear or apprehension must be the direct or animating cause, and the only cause of the transfer, it seems quite clear to us that the transfers in question were not made in contemplation of death.

The plaintiffs have not only overcome the presumption created by the statute that the transfers were made in contemplation of death but have definitely established the fact, that the immediate and moving cause of the transfers was the carrying out of a policy long followed by decedent in dealing with his children of making liberal gifts to them during his lifetime. He had consistently followed that policy for nearly thirty years and the three transfers in question were a continuation and final consummation of such policy. In the last transfer such amounts were given to his children as would even them up one with another, in the gifts and advancements made to them.

That this was the motive which actuated the decedent in making these transfers seems unquestioned. He repeatedly, in letters to his children and in statements to business associates at about the time the transfers were made, gave this as his reason for such transfers.

After the final transfer in which the advancements and gifts to the children were evened up in January, 1921, the decedent still possessed property of the value of nearly $900,000, from which he drew an annual income of approximately $50,000. At the time the transfers were made, decedent had no reason to believe otherwise than, aside from his asthma, he was, for a man of his age, in ordinary health. While he had gone through a most serious and painful illness, he had, as he believed, made an almost complete recovery. He was assured of this fact by his physician, an eminent specialist, in whom he had great confidence. The repeated statements made by him to close friends and associates, his daily activities in matters connected with his business affairs, his letters to his children assuring them of his renewed health, show that he fully believed the assurances given him by his physician that he was cured and had nothing to fear on account of his former illness.

The presumption created by the statute that the transfers in question were made in contemplation of death can not stand against

ascertained and proven facts showing the contrary to be true. The best evidence of the state of the decedent's health at the time the transfers were made is the statement of his doctor. The best evidence of the decedent's state of mind at that time and the reasons actuating him in making the transfers are the statements and expressions of the decedent himself, supported as such statements are by all the circumstances concerning the transfers. Decedent's physician says that at the time the transfers were made he was in normal health for a man of his age. The decedent in letters to his children and in statements to his friends repeatedly assured them he had recovered from his former illness and was again enjoying reasonable health. He also gave satisfactory reasons for making the transfers in question, which reasons are entirely consistent
49 with all the other facts and circumstances surrounding the transactions and with the policy followed by him for many years in dealing with his children.

It is urged on behalf of the defendant that the fact decedent during the time he was in the hospital, between July 10, 1920, and September 22, 1920, made and entered into a property agreement with his wife as to her share of his property, and made and executed at the same time a will in which the terms of the agreement made with his wife were carried out, and in which also provisions were made for his children, is a strong circumstance supporting the presumption that the two transfers of property made by him later were made in contemplation of death. While these transactions are entitled to consideration in connection with all the other facts and circumstances shown, we do not regard them as having a great deal of weight in determining the question as to the decedent's state of mind, and the motives actuating him in making transfers of property, four months later. No transfers of property were made to the children at the time of the execution of the property agreement with his wife, and the provisions made for their benefit in the will executed at that time were identical with the provisions of a former will. Whatever apprehensions the decedent entertained at the time of the making of the property agreement with his wife as to the chances of recovery from the illness from which he was suffering at that time, had ceased to exist before the transfer of the Girard Lumber Company stock on January 1, 1921, and the Lloyd Manufacturing Company stock on January 26, 1921.

We are of the opinion the three transfers in question were not made by the decedent in contemplation of death, and that the plaintiffs are entitled to recover the sum of $83,683.62, with interest thereon as provided by law from May 28, 1924, the date on which the taxes were paid. It is so ordered.

GREEN, Judge; GRAHAM, Judge; and BOOTH, Chief Justice, concur.

LITTLETON, Judge, took no part in the decision of this case.

50 V. *Judgment*

At a Court of Claims held in the city of Washington on the 7th day of April, A. D. 1930, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiffs are entitled to recover.

It is therefore adjudged and ordered that the plaintiffs recover of and from the United States the sum of eighty-three thousand six hundred eighty-three dollars and sixty-two cents ($83,683.62), with interest at the rate of six per cent per annum from May 28, 1924, to such date as the Commissioner of Internal Revenue may determine, in accordance with the provisions of subsection (b), section 177, of the Judicial Code, being a part of the revenue act of May, 1928.

51 [Clerk's certificate to foregoing transcript omitted in printing.]

C (Indorsement on cover:) File No. 35174. Court of Claims. Term No. 252. The United States, petitioner, vs. Artemus C. Wells et al., Executors of the Estate of John W. Wells. Petition for a writ of certiorari and exhibit thereto. Filed July 3, 1930. File No. 35174.

U. S. GOVERNMENT PRINTING OFFICE: 1930

Supreme Court of the United States

Order allowing certiorari

Filed October 13, 1930

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1930

Office Supreme Court
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No. 252

In the Supreme Court of the United States

OCTOBER TERM, 1930

THE UNITED STATES, PETITIONER

v.

ARTEMUS C. WELLS ET AL., EXECUTORS OF THE ESTATE OF JOHN W. WELLS

ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 252

THE UNITED STATES, PETITIONER

v.

ARTEMUS C. WELLS ET AL., EXECUTORS OF THE ESTATE OF JOHN W. WELLS

ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 29–37) is reported in 69 C. Cls. 485, and in 39 F. (2d) 998.

JURISDICTION

The judgment of the Court of Claims was entered on April 7, 1930. (R. 38.) The petition for a writ of certiorari was filed July 3, 1930 (R. 38), and the writ was granted on October 13, 1930 (R. 39). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in determining the taxable estate of a decedent, under Section 402 (c) of the Revenue Act of 1918, the value of a material part of his property, transferred by him to his children within two years prior to his death as advancements, should be excluded as not having been made in contemplation of death because a reasonable fear of immediate death arising out of some existing bodily or mental condition or impending peril was not the direct and only cause of the transfer.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in Appendix A, *infra*, pp. 30–31.

STATEMENT

John W. Wells, a resident of Michigan, died testate on August 17, 1921, at the age of 73 years. (R. 14.) Within two years prior to his death the decedent made three transfers, of the aggregate value of $782,903, to his children without consideration. (R. 28.) These transfers constituted approximately half, and were a material part of his property. (R. 28.)

One transfer made in December, 1919, was of securities valued at $103,808, and the last two transfers, made in January, 1921, within eight months of his death, aggregated in value $669,095. (R. 28.) The last of these transfers, amounting to $334,170 was given in final equalization of advance-

ments made during the twenty preceding years to his five children and recorded in separate accounts kept by the decedent. (R. 15, 22, 23.) His will, executed in a hospital in Chicago in August, 1920, five months prior to this equalization, provided that all advancements should be charged to and deducted from his children's respective shares. (R. 18.) At about the same time decedent executed a postnuptial agreement with his wife to will her $100,000 in lieu of her statutory rights. The wife ratified all gifts made by the decedent to his children, either before or after the execution of the agreement. (R. 18.)

In April, 1920, eight months prior to the final transfer and equalization of the advancements to his children, decedent, while in California, became afflicted with ulcerative colitis, an aggravated form of dysentery. (R. 16.) Decedent's father had died of chronic dysentery. (R. 16.) Physicians advised decedent he had cancer of the intestines, and on July 9, 1920, he went to the Presbyterian Hospital in Chicago, where the disease was diagnosed as ulcerative colitis. (R. 17.) He remained at the hospital two months and a half. (R. 17, 19.)

In November, 1920, decedent returned to the hospital for an operation for ethmoiditis to relieve his asthma (R. 20), from which he had suffered for five years (R. 16). During his ten-day stay the treatment for ulcerative colitis was continued. (R. 20.)

In December, 1920, and January, 1921, decedent finally equalized the advancements to his children as above stated. (R. 21.)

In April, 1921, while in California, the decedent had a recurrence of the ulcerative colitis, which was then suspected to be cancer of the intestines. An operation was advised. (R. 26.) He returned to the Chicago hospital in June, 1921, for the fifth time, suffering from a virulent attack of the same disease that did not respond to treatment. (R. 26.) An abdominal operation to relieve the acute ulcerative colitis was performed on August 10, 1921. He died August 17, 1921. The death certificate gave as the cause of death "suppurative colitis" and its duration one year. (R. 26.)

The Commissioner of Internal Revenue determined that the three transfers were made in contemplation of death and included their value in decedent's gross estate. (R. 27.) The respondents paid the tax assessed and upon rejection of their claim for refund on the ground that the transfers were not made in contemplation of death (R. 27) brought this suit in the Court of Claims. That court upon its special findings of fact, which did not include any finding as to whether the transfers in question were made in contemplation of death, rendered judgment, as a conclusion of law from such findings, in favor of the plaintiffs for the sum of $83,683.62, with interest. The court's view of the law was stated in its opinion (R. 36), as follows:

Applying these facts to the rule that the term "contemplation of death" does not mean that general knowledge of all men that they must die, but that there must be a present apprehension, from some existing bodily or mental condition or impending peril, creating a reasonable fear that death is near at hand, and that such reasonable fear or apprehension must be the direct or animating cause, and the only cause of the transfer, it seems quite clear to us that the transfers in question were not made in contemplation of death.

SPECIFICATION OF ERRORS

The court below erred—

1. In holding that "contemplation of death" as used in 402 (c) of the Revenue Act of 1918 is limited to "a present apprehension, from some existing bodily or mental condition or impending peril, creating a reasonable fear that death is near at hand."

2. In holding that "a transfer made in contemplation of death" as used in Section 402 (c) of the Revenue Act of 1918, means a transfer of which a reasonable apprehension of death near at hand is the direct, animating, and only cause.

3. In giving judgment for the respondents.

SUMMARY OF ARGUMENT

The history of taxation on gifts made in contemplation of death shows that there has been a tendency on the part of the legislatures and the courts

to broaden the meaning of the words "in contemplation of death" in order that the tax may be made effective. Early decisions construed these words as referring only to gifts *causa mortis*, but this definition has been abandoned in favor of constructions which, although at variance with each other, are becoming increasingly liberal. This Court has not had occasion to pass upon the meaning of the phrase as used in the Federal estate tax laws.

It is clear that the words "in contemplation of death" mean neither that knowledge which all men have that ultimate death is inevitable nor such an expectancy of death as is required in a gift *causa mortis*. Congress intended to tax certain gifts *inter vivos* which are made in lieu of those usually effected by will or by the operation of the intestacy laws. The character of such gifts is determined by the state of mind of the donor at the time they are made. If his purpose is to attain some object desirable to him during his life as distinguished from the distribution of his estate as at death, the gift is not of the character declared to be taxable. The Act provides that all gifts made within two years of death are presumed to have been made in contemplation of death unless the contrary is shown. Various types of evidence are available to the taxpayer for the purpose of rebutting this presumption. Of these the fact that the donor was in good health is only one, and is not sufficient to overcome the presumption if the donor was so far advanced in

years that death could not, in the nature of things, be far away.

The presumption may be overcome only by proof that the decedent in making the gift was actuated by an affirmative desire to achieve some purpose desirable to him in his lifetime. If the existence of such a purpose does not appear, the gift is presumed to have been testamentary in character and is therefore taxable.

In the instant case the gifts were made when the donor was over 70 years of age. The lower court did not find as a fact that the gifts were not made in contemplation of death. Nor did it find as a fact that they were made to fulfill some living purpose of the donor. At the time of the second and third transfers, the decedent was recovering from a severe illness which was of the same nature as that which eventually caused his death. The decision of the Court of Claims was founded on an erroneous interpretation of the Act placing undue emphasis on the decedent's physical condition as distinguished from his state of mind which alone established the character of the gift.

ARGUMENT

I

PRELIMINARY STATEMENT

Whether a transfer is or is not made "in contemplation of death" is a mixed question of law and fact. Involved in its determination is the interpretation of the words "in contemplation of death" as

used in the Revenue Act. The proper construction of these words is purely a question of law. The Court of Claims in the instant case held that a gift was not made in contemplation of death unless a present apprehension from some existing bodily or mental condition or impending peril creating a reasonable fear that death was near at hand was the direct or animating cause and the only cause of the transfer. (R. 36.) The Government submits that this interpretation of the statute is erroneous.

The words "in contemplation of death" were first used by Congress in the provisions relating to the estate tax imposed by the Revenue Act of 1916. These provisions have been reenacted in subsequent revenue legislation without substantial change, but the words in question have never been interpreted by this Court.

The provisions of the 1916 estate tax were modeled upon state statutes enacted prior to 1916. Taxation of testamentary transfers of property had long been familiar in law, the earlier inheritance, estate, or succession taxes being imposed only on transfers occasioned by death. Experience had shown that such taxation was rendered ineffective by reason of the fact that owners of large estates could avoid the tax by making transfers *inter vivos* when old age or sickness indicated the approach of death and so gifts *inter vivos*, made in contemplation of death, were subjected to the tax.

Pursuant to the general purpose to tax transfers normally made by will or succession, the legisla-

tures and the courts have shown a tendency to give meaning to the words "in contemplation of death" which will make the taxing statutes effective. Early decisions construed these words as referring only to gifts *causa mortis,* but this definition has been abandoned in favor of constructions which, although at variance with each other, are more consistent with the purpose of such provisions. A brief summary of the state statutes and decisions relating to the phrase "contemplation of death" is printed in Appendix B, *infra,* pp. 31–36.

This Court has had no occasion to construe the words "in contemplation of death" as used in the Federal estate tax laws. The case of *Shwab* v. *Doyle,* 258 U. S. 529, was disposed of on the ground that the Revenue Act of 1916 did not operate retrospectively to tax a transfer completed prior to its enactment. In *Shukert* v. *Allen,* 273 U. S. 545, 547, this Court remarked in passing that it was not argued that the transfer in question was effected "in contemplation of death as a device to escape taxes." But this was far from stating that an intent to evade is essential to taxability.

In *Nichols* v. *Coolidge,* 274 U. S. 531, it was said that the provision taxing transfers in contemplation of death was (p. 542)—

> necessary to prevent evasion and give practical effect to the exercise of admitted power.

In 1926 Congress substituted, with respect to transfers thereafter made, a two-year conclusive

presumption for the rebuttable presumption appearing in the earlier Acts. (Revenue Act of 1926, Section 302 (c) c. 27, 44 Stat. 70.) The reason for this change of policy appears in the report of the Committee on Ways and Means (House Rep. No. 1, 69th Congress, 1st Session, p. 15), which reads in part as follows:

> Under all the prior Revenue Acts, a gift or transfer of property by trust or otherwise without a fair consideration and within two years prior to the decedent's death is, unless shown to the contrary, deemed to be made in contemplation of death, and the amount of the gift or transfer is included in the gross estate of the decedent. The presumption, however, is rebuttable and has proved very ineffective in practical administration. * * * Experience under the Act of 1921 showed that the honest and scrupulous citizen paid the tax, but many less scrupulous found an easy way of evading it. This not only caused great loss in revenue to the Government, but was grossly unfair to those who paid the tax in good faith.

II

GIFTS MADE "IN CONTEMPLATION OF DEATH" ARE NOT LIMITED TO TRANSFERS INDUCED BY AN EXISTING CONDITION OF ILL HEALTH CAUSING APPREHENSION OF DEATH IN THE NEAR FUTURE

In defining the meaning of the phrase "in contemplation of death" it is necessary to view the

words in the setting in which they are found in the statute. Taken by themselves without reference to their context, they might mean that knowledge which all men have that ultimate death is inevitable, or, on the other hand, they might be taken to refer to an expectancy of immediate death such as is inherent in the making of a gift *causa mortis*. Viewed in the light of the purpose of the statute, their meaning lies between these two extremes.

The principle upon which death duties rest is that death is the "generating source" from which the authority to tax arises. See *Knowlton* v. *Moore*, 178 U. S. 41. Usually the event upon which the tax is imposed is a transfer or an enlargement of property rights caused by and taking effect at death—as where the property passes by will or by operation of the intestacy laws. *Tyler* v. *United States*, 281 U. S. 497. In such cases the incidence of the tax is clear.

When the class of transfers upon which the tax is imposed is enlarged to include transfers in contemplation of death, the scope of the Act must be determined in the light of its purpose. All courts agree that the expression "contemplation of death" refers to a state of mind, but the exact mental condition which the statute specifies can only be defined by the purpose sought to be accomplished. That purpose is not to tax all gifts *inter vivos*, but to include within the taxable class gifts which are similar in their nature to transfers of property by

will or by succession. The purpose of such inclusion is, of course, to bring within the taxable class gifts *inter vivos* which may fairly be included because testamentary in purpose, and thus to prevent the avoidance of taxes upon transfers which would normally accrue at death. The purpose of the statute to prevent avoidance of such taxation is emphasized in *Nichols* v. *Coolidge*, 274 U. S. 531, and *Rengstorff* v. *McLaughlin*, 21 F. (2d) 177 (N. D. Cal.)

This controlling statutory purpose must fail of accomplishment if the words of the enactment are so narrowly construed as to include in the taxable class only gifts *causa mortis*, for it is obvious that many gifts *inter vivos* are made to avoid the payment of death duties, and to serve no other purpose, by persons who are in no immediate fear of death because of existing ill health.

Because of the practical difficulty of adducing positive proof as to the mental connection between a gift and death, Congress has declared that every transfer in the nature of a final disposition or distribution of a material part of one's property made within two years of death shall be presumed to have been made in contemplation of death. In other words, contemplation of death must be accepted as the fact until the contrary is shown. The burden is upon the taxpayer to prove that the gift was not of such a character.

Obviously, contemplation of death must have some causal connection with the gift. How imme-

diate or how potent the statute does not say, nor does it say how a gift presumed to have been made in contemplation of death may be shown not to have been so made. If, in view of the general purpose of the law, doubt remains, these questions may be resolved by a consideration of the circumstances which prompt men to make transfers of a material part of their possessions by way of final disposition thereof—transfers such as are usually reserved until death renders the property of no further use to its owner.

Common experience shows that such transfers are not normally made so long as the owner is relatively young and in good health. The donor's state of health, therefore, may furnish a valuable indication of the purpose of the gift, and consequently of its character. Influenced, no doubt, by the early New York decisions construing "contemplation of death" as the equivalent of *causa mortis* (see pp. 31–32, *infra*), a number of courts have considered that a gift made while the donor was well and vigorous can not have been made in contemplation of death within the meaning of the statute. This is on the assumption that contemplation of death means "expectation of immediate death" (*Gaither* v. *Miles* 268 Fed. 692, 694 (D. Md.)), or "anticipation of death in the immediate or reasonably distant future" (*Vaughan* v. *Riordan*, 280 Fed. 742, 743 (W. D. N. Y.)). In the instant case the Court of Claims

invoked this rule stated in *Rea* v. *Heiner,* 6 F. (2d) 389 (W. D. Pa.), where it was said (p. 392) that there must be "a present apprehension from some existing bodily or mental condition or impending peril, creating a reasonable fear that death is near at hand." Substantially the same language is found in *Flannery* v. *Willcuts,* 25 F. (2d) 951 (C. C. A. 8th), and *Beeler* v. *Motter,* 33 F. (2d) 788 (D. Kan.).

To give to the words "contemplation of death" the narrow meaning of "apprehension or fear of immediate death or death in the very near future" restricts the literal meaning of the Act and operates to defeat its acknowledged purpose, as the case at bar so clearly proves. The taxpayer's construction unduly stresses the physical condition of the donor and ignores his state of mind which alone fixes the character of the gift. Bodily and mental conditions at the time the gift is made are merely evidence of the donor's state of mind and can not be regarded as essential elements of a taxable transfer because the statute nowhere declares that they are. On the contrary, the statutory presumption that all gifts made within two years of death are made in contemplation of death, clearly shows that Congress did not regard infirmities of mind or body as essential to every gift made in contemplation of death.

In construing Section 402 (c) the Treasury Department has given weight to the donor's condi-

tion of health. Article 23 of Regulations 37 (1919 ed.), *infra*, pp. 30–31, declares that a transfer is made in contemplation of death—

> whenever the person making it is influenced to do so by such an expectation of death, arising from bodily or mental conditions, as prompts persons to dispose of their property to those whom they deem proper objects of their bounty.

But this statement is qualified by the provision which follows:

> The cause which induces such bodily or mental conditions is immaterial, and it is not necessary that the decedent be in the immediate expectation of death.

In other words, "bodily or mental conditions" does not refer solely to serious illness likely to result in death. What kinds of physical or mental conditions do influence a man to dispose of his property to those whom he deems proper objects of his bounty?

Undoubtedly if a man who is afflicted with a disease the severity of which he probably or demonstrably suspects or knows, makes a gift of a substantial part of his property, the evidence as to his health is strongly persuasive as to his state of mind and therefore as to the character of the gift. Conversely, freedom from illness at the time of the transfer tends to show that the donor was not concerned with the effect of death upon the devolution

of his estate. But we submit that proof of good health alone is not sufficient to rebut the statutory presumption that a transfer made within two years of death was made in contemplation of death.

Perhaps the most common bodily condition which prompts persons to dispose of their property by transfers testamentary in nature is that of advanced years. As the Prerogative Court of New Jersey said in *In re Bottomley's Estate*, 92 N. J. Eq. 202, 208, when a man has passed "the scriptural mark of three score years and ten," he must necessarily look upon death as being "not on the horizon of life but in its foreground, and, perhaps, very near." It is a bodily condition which induces that frame of mind, and existing freedom from a specific illness does not necessarily neutralize it.

We do not endorse the dictum of the District Court for the Northern District of California in *Rengstorff* v. *McLaughlin*, 21 F. (2d) 177, *supra*, where it was said (p. 178) that—

> a person of comparative youth, enjoying good health, may nevertheless make a transfer of property, "in contemplation of death" within the meaning of that phrase.

So broad a construction of the statute would cover gifts made merely in that expectation of death which is common to all men at all times. But if advancing years overcome the desire to retain one's possessions during life and distribution of one's estate is made *inter vivos* to the natural ob-

jects of one's bounty, it is fair to say that approaching death has induced a final settlement of earthly affairs.

We submit, therefore, that in giving judgment for the plaintiff on the ground that the decedent was not, at the time of the transfers, under an apprehension of imminent death arising from an existing illness, the Court of Claims based its conclusion on an erroneous interpretation of the statute.

III

THE PRESUMPTION THAT A GIFT MADE WITHIN TWO YEARS OF DEATH WAS MADE IN CONTEMPLATION OF DEATH CAN BE OVERCOME ONLY BY PROOF THAT THE DONOR WAS ACTUATED BY A DESIRE TO ACHIEVE SOME PURPOSE DURING HIS LIFETIME AS DISTINGUISHED FROM ONE RELATED PRIMARILY TO THE DEVOLUTION OF HIS ESTATE AT DEATH

Because of the acknowledged purpose of the "contemplation of death" provision, some courts have shown a tendency to look for evidence of an intent on the part of the transferor to avoid the tax before holding a transfer taxable. In *Matter of Baird*, 219 App. Div. 418, 421, it was said that the words "in contemplation of death" have reference to a situation where expectation of imminent death based on an existing condition of ill health is the inducing cause of the transfer or—

> where a transfer is made "in bad faith" or so as "to evade" or "defraud the State of the tax" or "to cheat the law."

The danger of such a criterion is that it injects an element of fraudulent intent which is neither expressed nor implied in the language of the Act.

In *Kunhardt* v. *Bugbee*, 3 N. J. Misc. 1107, affirmed on reargument, 4 N. J. Misc. 692, the Supreme Court of New Jersey went to the opposite extreme in saying that whether the donor had or had not any thought of evading the tax was immaterial, provided the gift was of the kind declared to be taxable. And in *Shwab* v. *Doyle*, 269 Fed. 321, 329, the Circuit Court of Appeals for the Sixth Circuit said:

> Manifestly, the question of intent to evade has no pertinency to the case of a purely testamentary conveyance inter vivos.

Inasmuch as the character of the gift for purposes of taxation is determined by the motive actuating it, evidence of an intent to avoid the tax is convincing evidence that the donor was concerned with the distribution of his property in anticipation of his death. On the other hand, the absence of such evidence can not overcome the statutory presumption.

What affirmative proof, then, can the executors present for the purpose of showing that the transfer was not of the character declared to be taxable? Article 23 of Regulations 37 (1919 ed.) (*infra*, pp. 30–31) provides that—

> The presumption of taxability may be rebutted by proof that the transfer was not in-

duced by bodily or mental conditions leading the grantor to make a disposition of property testamentary in its nature.

If, as we contend, advanced age is a bodily condition that may lead to a state of mind sufficient to impress the gift with a taxable character, then, in order to overcome the presumption, evidence must be produced showing that the donor's distribution of his possessions is not merely in anticipation of his approaching death but is intended to accomplish some purpose desirable to him if he continues to live.

Manifestly there are some circumstances in which a man will in the normal course of human conduct dispose of a substantial portion of the property which he has accumulated to accomplish some purpose immediately in view without any expectancy of death either immediate or remote. The fact that men who are old and men who are ill frequently give away substantial portions of their estates and that men who are both young and well seldom do, shows forcibly that such gifts are usually made with death in view; nevertheless the nature of the gift may show the contrary. Since the application of the law depends on the character and incidents of the transfer itself, and since the law covers only such transfers as are of a testamentary character, assistance may be derived from a consideration of incidents such as would not ordinarily be present in a transfer by will or succession. In

other words, affirmative evidence should be produced that the transfer served some living purpose of the donor, if the presumption is to be overcome.

In those cases in which the transfers have been held not in contemplation of death there has always been proof that the donor wished to accomplish some purpose during his own lifetime and was induced by such a desire to make the gift. Thus transfers made for the purpose of relieving the donor of the cares of management or in order that his children may experience the responsibilities of business under his guidance and supervision have been held to be of that character. *Flannery* v. *Willcuts*, 25 F. (2d) 951 (C. C. A. 8th), *supra*; *Tips* v. *Bass*, 21 F. (2d) 460 (W. D. Tex.); *White* v. *Commissioner*, 15 B. T. A. 470; *Gimbel* v. *Commissioner*, 11 B. T. A. 214. Similarly, where the donor in order to reduce income taxes has transferred property to others, his purpose has been recognized as one pertaining to his lifetime and not in contemplation of death. *Vaughan* v. *Riordan*, 280 Fed. 742 (W. D. N. Y.), *supra*.

On the other hand, there may be evidence of a definite purpose, other than the avoidance of taxation, which is nevertheless a purpose having to do with death rather than with life. Thus in *In re Benton's Estate*, 234 Ill. 366, it appeared that the donor wished to prevent certain property from falling into the hands of a stepson through the exercise of the widow's right to take against the will. The

Supreme Court of Illinois held, and we believe properely so, that the transfer was of the kind declared to be taxable.

Various other considerations may throw light on the testamentary or nontestamentary character of the gift. Whether the transfer affected a large or small part, relatively, of the donor's estate has been held a factor of great if not controlling weight. *Flannery* v. *Willcuts*, 25 F. (2d) 951 (C. C. A 8th), *supra*; *Rengstorff* v. *McLaughlin*, 21 F. (2d) 177 (N. D. Cal.), *supra*; *Vaughan* v. *Riordan*, 280 Fed. 742 (W. D. N. Y.), *supra*; *Gaither* v. *Miles*, 268 Fed. 692 (D. Md.), *supra*; *Beeler* v. *Motter*, 33 F. (2d) 788 (D. Kan.), *supra*. Similarly, the fact that the donor was in the habit of making allowances from his income to those dependent upon him may tend to show that the transfer in question was effected for some definite living purpose and was not made in contemplation of death.

We contend that all these factors must be given due consideration if the purpose of the Act is not to be defeated. While the ultimate question is one of fact, as to whether the transfer in question has taxable characteristics, the determination of that fact must be controlled by an understanding of the legal significance of the words "in contemplation of death." We submit that the significance given to that phrase by the Court of Claims was clearly erroneous.

IV

IF THE DEFINITION OF A GIFT IN CONTEMPLATION OF DEATH ADOPTED BY THE COURT OF CLAIMS IS TOO NARROW, THE JUDGMENT IS NOT SUPPORTED BY THE FINDINGS OF FACT AND SHOULD BE REVERSED

The findings of the Court of Claims do not state, as a fact, that the decedent was or was not contemplating death at the time when the three transfers in question were made. They merely describe the circumstances surrounding each transfer. From such circumstances the court concluded as a matter of law that the gifts were not taxable. We believe that the salient facts bearing on the character of the gifts demonstrate that these facts, when subjected to the legal tests outlined above, do not justify the conclusion reached by the court.

All facts required to bring the statutory presumption into play are present in the instant case. All three transfers were made within two years of death. They were of a material part of the estate. (R. 28.) They were in the nature of a final disposition or distribution to natural objects of the donor's bounty, and were without consideration. The burden is therefore upon the executors to show they were not made in contemplation of death.

When the first transfer took place on December 24, 1919, the decedent was nearly seventy-two years of age. He died approximately one year and eight months later. The facts on which the Court of

Claims relied as overcoming the presumption were that the decedent was in good health, that in making the gift he was following out a definite policy of distributing property among his children during his life, and that the gift to his son, Artemus, was in recognition of his services to a company in which the decedent was vitally interested.

We submit that the fact that Mr. Wells was suffering from no illness at the time of the transfer is not sufficient, in view of his age, to rebut the presumption. Nor do the other facts to which the court referred show that the decedent was concerned with a purpose which he desired to see achieved during his life.

As early as 1901 Mr. Wells had started making advancements to his children in order that he might discover how capable they were of managing substantial amounts of property. Of these advancements he kept careful record (R. 15), and it is apparent that he always contemplated that they should be taken into account in the final distribution of his estate: His will, executed in August, 1920, contains specific instructions to that effect. (R. 18, 19.) But in 1919 he had had ample opportunity to test the business acumen of his children, and we submit that there is every reason to infer that the transfers here involved represented the fruits of his experience rather than the continuation of the policy of experimentation.

With respect to such advancements, Article 23 of Regulations 37 (*infra*, p. 31) provides as follows:

> The fact that a gift was made as an advancement, to be taken into account upon the final distribution of the decedent's estate, is not enough, standing alone, to establish taxability; but it is a circumstance to be considered in determining whether the transfer was made in contemplation of death.

The findings do not state that any of the advancements in question were made for the purpose of developing business ability in his children. They merely show the existence of the general policy. We submit, therefore, that the facts found are not sufficient to warrant the conclusion which the court reached.

The court below said in its opinion (R. 33) that the "moving cause" for the gift of stock to Artemus Wells was a recognition of the services rendered by him to J. V. Wells Lumber Company. It suffices to say that no evidence of such a motive appears in the findings. Moreover, this would not explain the gift of 73 shares to the other son, Daniel.

The other two transfers which were considered by the Commissioner to have been made in contemplation of death, took place on January 1, 1921, and January 26, 1921, respectively. At that time the decedent had for several months been suffering from ulcerative colitis, a form of dysentery. This

condition first appeared in April, 1920, and in June of that year the decedent was informed by a physician in California that he had cancer of the intestines. (R. 16, 17.) In July, 1920, he entered a hospital, where he remained for more than two months under treatment. Although the condition was severe, Mr. Wells was told by the doctor that he would recover. (R. 17.)

There can be little doubt that he took his illness seriously. Shortly after entering the hospital, he executed an agreement stating that by reason of his illness he wished to provide for his wife in the manner therein set forth. (R. 18.) By the agreement his wife ratified all gifts made by Mr. Wells to his children and Mr. Wells agreed to execute a will leaving to his wife the sum of $100,000. This clearly shows that he had in mind the possibility that his illness would prove fatal. At about the same time and while he was still in the hospital, he executed a new will in which were incorporated the provisions of the agreement. (R. 18.)

On returning home from the hospital in September, 1920, Mr. Wells told his son, Artemus, that he was completely cured. In November he returned to the hospital for an operation designed to relieve an asthmatic condition. While there he received further treatment for the ulcerative colitis which the hospital records showed had not entirely cleared up. (R. 20.)

In December, 1920, shortly after his return from the hospital, he spent considerable time equalizing the advancements he had made to his children by adding interest upon the respective debit balances. (R. 21.) On December 31, 1920, he transferred 68,985 shares of stock of the Girard Lumber Company to his children, and the adjusted accounts of the advancements as of January 1, 1921, were marked "cancelled" and "balanced to date as a gift." (R. 21.)

It seems clear that in transferring this stock and balancing and closing the respective accounts, the decedent was no longer pursuing his policy of making advancements to his children for the purpose of testing their business ability. The tests had been continued over a period of twenty years. The decedent had recently passed through a serious and painful illness and, although he had been pronounced cured, there must have been in his mind the thought that a man of his age, having once been afflicted with an ailment of that nature, must face the possibility that death was reasonably near at hand. The physical circumstances alone would justify this supposition, but we have the additional fact that the decedent believed his father's death to have been caused by the same disease from which he himself had suffered. (R. 16.) This must inevitably have contributed to the realization that he might not have much longer to live.

The optimistic statements which the decedent made to his family and friends are not necessarily

indicative of his true state of mind. He had been an active man, living a busy life, and such men are not usually prone to admit to others—least of all to their immediate families—that they are no longer as vigorous as they used to be. Moreover, the decedent was much concerned with putting his affairs in order in anticipation of death.

In December, 1920, when the transfer of stock of the Girard Lumber Company took place, the decedent was on a diet and was taking bismuth for his intestinal condition. Under these circumstances he must have realized that there was a possibility of the colitis recurring. Ten days after making the transfer, he returned to the hospital for a further operation to relieve his asthma, and the hospital records show that the colitis was still present to a slight degree. Upon his discharge on January 14, 1921, he was instructed to continue with the diet which had been prescribed.

On January 26, 1921, the decedent made the third and last of the transfers here involved, in the form of a trust agreement whereby he assigned to a trustee 3,713 shares of stock of the Lloyd Manufacturing Company to be exchanged by the trustee for a like number of shares of stock of a proposed corporation, which were to be distributed among the decedent's children within sixty days of issue. (R. 23.) At about the same time he wrote to his son Ralph and to his daughter Edna, advising

them of the transfers and of the manner in which the various advancements were to be equalized. (R. 24.)

Shortly afterwards Mr. Wells went to California, where for two months he appeared to enjoy relatively good health. (R. 25.) In the middle of April he had a recurrence of the ulcerative colitis. On June 5, 1921, he reentered the hospital in Chicago, where he died on August 17, 1921, after an operation. The death certificate gave suppurative colitis as the cause of death, and stated that its duration was one year. (R. 26.)

We submit the facts show that in making all three transfers, the decedent was actuated by the thought of death and its consequences. It is true that in 1919 he was free from illness, but it is also true that he was at that time almost 72 years of age. If, as we contend, a condition of ill health does not constitute the final test, and age is a bodily or mental condition such as may induce a man to make a final disposition of his property, then we submit that the presumption has not been successfully overcome. *Luscomb* v. *Commissioner*, 30 F. (2d) 818 (C. C. A. 2d); *Schaefer* v. *Lucas*, 44 F. (2d) 476, 488 (C. C. A. 4th).

With respect to the transfers in 1921, the facts show that the decedent had been seriously ill and that these gifts had been made almost immediately after his apparent recovery. This, together with

his age, is, we submit, persuasive evidence that he was putting his affairs in order with the thought that death might not be far away.

CONCLUSION

The judgment of the Court of Claims should be reversed.

Respectfully submitted.

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FEBRUARY, 1931.

APPENDIX A

STATUTES AND REGULATIONS INVOLVED

STATUTE

Section 402 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1097, provided in part as follows:

> SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act) except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

Article 23 of Regulations 37 (1919 ed.) promulgated under the Revenue Act of 1918, provides in part as follows:

> ART. 23. *Nature of transfer.*—The words "in contemplation of death" do not refer to

the general expectation of death which all persons entertain. A transfer, however, is made in contemplation of death whenever the person making it is influenced to do so by such an expectation of death, arising from bodily or mental conditions, as prompts persons to dispose of their property to those whom they deem proper objects of their bounty. The cause which induces such bodily or mental conditions is immaterial; and it is not necessary that the decedent be in the immediate expectation of death. * * * Transfers made within two years of a decedent's death are presumed to be taxable if they are of a material part of his property and are in the nature of a final disposition thereof. * * * All facts relating to the transfer should be stated, including the motive therefor, the decedent's state of health, and his anticipation of death. The presumption of taxability may be rebutted by proof that the transfer was not induced by bodily or mental conditions leading the grantor to make a disposition of property testamentary in its nature. The fact that a gift was made as an advancement, to be taken into account upon the final distribution of the decedent's estate, is not enough, standing alone, to establish taxability; but it is a circumstance to be considered in determining whether the transfer was made in contemplation of death.

Appendix B

SUMMARY OF STATE STATUTES AND DECISIONS RELATING TO "CONTEMPLATION OF DEATH"

In 1891 New York amended its transfer tax act to include transfers made in contemplation of the

death of the donor. N. Y. Laws, 1891, c. 215, p. 409. Despite the obvious purpose of this amendment the New York courts at first took the position, following a dictum appearing in *Matter of Seaman*, 147 N. Y. 69, 76, that the term "in contemplation of death" referred only to gifts *causa mortis* and that consequently a transfer which was complete and irrevocable prior to the death of the transferor was not subject to the tax. *Matter of Edgerton*, 35 App. Div. 125; *Matter of Spaulding*, 49 App. Div. 541; *Matter of Baker*, 83 App. Div. 530, affirmed, 178 N. Y. 575. But in *Matter of Crary*, 31 Misc. 72, a different view of the statute was taken, and it was held that it applied to gifts *inter vivos* in which a contemplation of death was the sole motivating cause.

The rule restricting the application of the statute to gifts *causa mortis* has been definitely abandoned in New York, but the earlier cases still appear to exert some influence upon the definition of the phrase by confining its application to cases in which the transferor was in such a physical condition as to make it appear that death was imminent. *Matter of Price*, 62 Misc. 149; *Matter of Dee*, 148 N. Y. Supp. 423, affirmed, 161 App. Div. 881, affirmed, 210 N. Y. 625; *Matter of Hodges*, 215 N. Y. 447.

The Illinois statute is substantially the same as the New York Transfer Act, but the Illinois Courts have at all times refused to be guided by the early New York decisions. In the leading case of *Rosenthal* v. *People*, 211 Ill. 306, 309, the Supreme Court of Illinois said:

> While the statute was doubtless not intended to impose limitations on the right of

> a person to give away his property whenever he might see fit, the intention clearly was to tax property passing by will or the intestate laws of the State, or by such gifts or transfers as are of like nature and can properly be classed therewith.

In *People* v. *Carpenter*, 264 Ill. 400, 408, the Court inserted into the definition the requirement that the transfer be motivated by an "apprehension of death which arises from some existing infirmity or impending peril," citing as authority the *Rosenthal case* and the case of *In re Benton's Estate*, 234 Ill. 366, in neither of which did such a qualification appear.

The Wisconsin Courts appear to have departed from the original definition set forth in the leading case of *State* v. *Pabst*, 139 Wis. 561, 590, in which it was said:

> The words are evidently intended to refer to an expectation of death which arises from such a bodily or mental condition as prompts persons to dispose of their property and bestow it on those whom they regard as entitled to their bounty.

In the later case of *State* v. *Thompson*, 154 Wis. 320, 328–329, the above definition was quoted with approval but the Court then said that this definition meant the same as that given in the New York case of *Matter of Baker*, 83 App. Div. 530, affirmed, 178 N. Y. 575, which referred to an apprehension of death arising from an existing physical condition.

The California legislature in 1911 amended the earlier acts of that State by inserting into them a definition of the term "in contemplation of death,"

which it said (Cal. Stats. 1911, c. 395, sec. 27, p. 726)—

> shall be taken to include that expectancy of death which actuates the mind of a person on the execution of his will, and in no wise shall said words be limited and restricted to that expectancy of death which actuates the mind of a person in making a gift *causa mortis*.

The Supreme Court of California has held that this amendment merely elucidated without changing the law by giving fuller expression to the legislative intent. *In re Reynold's Estate*, 169 Cal. 600; *Chambers* v. *Larronde*, 196 Cal. 100. In a case arising under the statute enforced prior to 1911 it had been held that the New York rule making a transfer in contemplation of death equivalent to a gift *causa mortis* was too strict and would not be followed. *Abstract and Title Guaranty Company* v. *State*, 173 Cal. 691.

In the case of *Chambers* v. *Larronde*, *supra*, the Supreme Court of California said (p. 112):

> For a transfer to be "in contemplation of death" it is not, as stated, necessary that the transferor be in fear of immediate death from an existing malady, as in a gift *causa mortis*, but, on the contrary, it is conceivable that a person of comparative youth, enjoying perfect health and vigor, may, nevertheless, make a transfer of his property "in contemplation of death" within the meaning of the act.

Somewhat similar language was used by the District Court for the Northern District of California in construing the Revenue Act of 1918. *Rengstorff* v. *McLaughlin*, 21 F. (2d) 177.

The Ohio Statute defines contemplation of death as "that expectation of death which actuates the mind of a person on the execution of his will." Section 5331 of the Ohio General Code, as amended by Ohio Laws, 1929, p. 682. In the case of *Tax Commissioner* v. *Parker,* 117 Ohio St. 215, the Supreme Court of that state held taxable gifts made by a man who, although seventy-four years old when he died, had no expectation of immediate death until a few days before it took place. The Court said (p. 223):

> * * * nor do we think the realization that he was soon to die controlling in determining whether the gift was made in contemplation of death. While we regard the evidence upon that subject as competent and entitled to be considered in connection with other facts, we are of the opinion that the controlling fact in determining whether a gift is made in contemplation of death is whether the gift was in the nature of a distribution of property rather than the bestowal of a favor upon the donee.

In *Armstrong* v. *State,* 72 Ind. App. 303, decided by the Court of Appeals of Indiana in 1918, we find a definition typical of those more recently expressed by the Courts in states where the phrase "in contemplation of death" has not been expressly defined by statute. The Court said (p. 315):

> The words "in contemplation of death," as used in inheritance tax statutes, do not refer to that general expectation of death entertained by all persons, but they do refer to that expectation of death which arises from such bodily or mental conditions, irrespective of the cause in any particular case, which prompts persons to dispose of their property

> to those they deem entitled to their bounty. Those words when employed in taxation statutes are not restricted to the technical meaning of such phrases when applied to gifts *causa mortis,* but are given a reasonable and literal interpretation, which tends to make effectual such taxation laws without destroying the right of the owner of the property to make an absolute gift of the same.

It is to be observed that this definition bears great similarity to the Treasury Regulations, promulgated under the Revenue Act of 1918 (Reg. 37, Art. 23, *supra,* pp. 30–31).

In 1903, Michigan, the State of which the decedent, Mr. Wells, was a resident, enacted a transfer tax act, containing a clause taxing gifts made in contemplation of death. Michigan Public Acts, 1903, p. 277, No. 195. The provisions of this Act are almost identical with those of the New York law, but there are no decisions by the Michigan courts indicating the manner in which it has been construed.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 252

THE UNITED STATES, PETITIONER,

v.

ARTEMUS C. WELLS ET AL., EXECUTORS OF THE ESTATE OF JOHN W. WELLS, DECEASED, RESPONDENTS.

BRIEF FOR RESPONDENTS.

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BRIEF FOR RESPONDENTS.

MAY IT PLEASE THE COURT:

This is an appeal granted by this Court to the United States from a decision of the Court of Claims holding that respondents were entitled to recover estate taxes in the amount of $83,683.62 exacted of them by the collecting officers of the United States. The respondents are the executors of the estate of John W. Wells, deceased.

Unless otherwise indicated, the italics of this brief are ours.

Opinion of the Court Below.

The opinion of the Court below in this action was rendered by the Court of Claims on April 7, 1930. It is reported in 39 Fed. (2d) 998.

Jurisdiction.

This Court has heretofore granted a writ of certiorari under Section 288 of the Judicial Code (28 U. S. C. A. 129).

The date of the decree of the Court of Claims is April 7, 1930. The petition for certiorari was filed on July 3, 1930. It was granted on October 13, 1930.

Issue in Court Below.

This is an action filed in the Court of Claims by respondents against the United States for the recovery of estate taxes erroneously and illegally collected from them on certain transfers alleged by the Commissioner of Internal Revenue to have been made by the decedent in contemplation of death. The issue in the Court below was whether such gifts were made *in contemplation of death*. The Court found that the gifts were not made in contemplation of death.

Statute Involved.

The statute here involved is Section 402(*c*) of the Revenue Act of 1918, which relates to the Federal estate tax. That section follows:

> "SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all

property, real or personal, tangible or intangible, wherever situated—

"(*c*) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a *bona fide* sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

Statement of the Case.

The material facts appear in the special findings of fact and opinion of the Court below (Rec. 14-37).

Summary of Argument.

We now contend:

1. THE FINDING OF THE COURT OF CLAIMS THAT THE GIFTS WERE NOT MADE IN CONTEMPLATION OF DEATH IS A FINDING UPON EITHER A QUESTION OF FACT OR A MIXED QUESTION OF LAW AND FACT, AND AS SUCH WILL NOT BE DISTURBED BY THIS COURT.

2. THE LOWER COURT DID NOT ERR IN ITS DEFINITION OF THE TERM "CONTEMPLATION OF DEATH".

3. EVEN THOUGH IT BE FOUND BY THE COURT THAT OBJECTION MAY PROPERLY BE MADE TO SOME PORTION OF THE DEFINITION OF THE TERM "CONTEMPLATION OF DEATH", IT WOULD NOT FOLLOW, WE SUGGEST, THAT THE JUDGMENT APPEALED FROM SHOULD BE REVERSED.

These, in the order stated.

The finding of the Court of Claims that the gifts were not made in contemplation of death is a finding upon either a question of fact or a mixed question of law and fact, and as such will not be disturbed by this Court.

Whether a particular gift was made in contemplation of death presents, we suggest, a question of fact, even though it be the ultimate fact to be found. This ultimate fact is to be taken not from any isolated circumstance, but rather from *all* the primary facts and circumstances of the case. The condition of health of the decedent at the time the transfer was made is one of the primary facts to be considered. The business activities of the decedent, his outlook on life, the relationship of the donee to the donor and to the subject-matter of the gifts, the policy and philosophy of the decedent regarding gifts to his children—all facts bearing on the question of the motivating cause of the gifts are to be considered. The Court of Claims is a fact-finding tribunal as well as a Court of law. Seldom indeed, if ever, has this Court reversed the Court of Claims in a case involving only a question of fact or a mixed question of law and fact.

If the finding below that the gifts were not made in contemplation of death be regarded as one of mixed law and fact, the rule enunciated by this Court is that this Court will not disturb the findings of the lower Court. In United States *v.* Swift & Company, 270 U. S. 124, appealed from the Court of Claims, the question at issue related to the authority of certain army officers to bind the United States by contracts for the purchase of meat supplies. Regarding the effect of the findings of the lower Court on that question, this Court said at page 137:

> "It is quite evident from the findings that in the organization and re-organization of the many agencies needed to furnish the supplies of food in Chicago, there were apparent conflicts of jurisdiction and there were orders issued having on their face general application which in fact by the course of business were limited, and all these orders from the War Department and from the Quartermaster's Department were before the court of claims for its consideration. In such a situation the finding of the court of claims that General Kniskern was the representative of the Quartermaster's Department in making these contracts for bacon is either a question of fact or a mixed question of law and fact, and is conclusive on this court."

In support of this statement of the rule, the Court cited United States *v.* Omaha Tribe of Indians, 253 U. S. 275. In that case, which was also appealed from the Court of Claims, the question presented was the liability of the United States under a treaty with the

Indians to make certain expenditures for their benefit. Upon the question involved in the present case, the Court said (p. 281):

> "The allowance for the infirmary is disputed upon the ground that the treaties, fairly construed, gave authority for expending moneys of the Omahas for this purpose, especially the very general language of article 4 of the Treaty of 1854, authorizing the President to expend a part of the fund 'for such beneficial objects as, in his judgment, will be calculated to advance them in civilization' and 'for medical purposes'. We construe the finding, 'This building was not used, and it was not such a building as was contemplated by the treaties', as meaning not that a building of this general character was not contemplated, but that the particular building was not what it ought to have been, and not suitable for the use of the Indians. So construed, it is either a finding upon a mere question of fact, or at most a finding of mixed fact and law where the question of law is inseperable. In the latter case, as in the former, the finding, on familiar principles, is not reviewable."

That there were abundant primary facts to support the finding of ultimate fact of the Court below is, we submit, shown by the special findings of fact and opinion of the lower Court.

We are seeking here to ascertain what was in the mind of the decedent at the time he made the gifts to his children or, as it is sometimes termed, the motivating cause of the transfers. Such motivating cause

may properly be inferred from the decedent's condition of health and from all that he said and did. We take the liberty of calling attention to the following:

1. The age of the decedent was 71 years past in December, 1919, and 72 years past in December, 1920, and January, 1921, when the transfers involved in the present case were made. Except for his father, who died during the Civil War, the decedent's family was a long-lived one. The decedent himself was active in business affairs until after the last of the transfers was made. His business activities continued, in fact, until his last illness, which began in April, 1921. In the 16th Finding of Fact (Rec. 19) it is stated that after he returned home from the hospital in September, 1920, the decedent resumed his normal business activities, which included the management of the business of the J. W. Wells Lumber Company and other business affairs in which he was interested. These activities continued up to the time of his death. He was at the office of the lumber company every day, around and about the plant, doing the work that he had always done, attending to correspondence and similar executive work. This work at the office and plant of the lumber company continued until he went to California on February 3, 1921.

After the decedent returned to California he resumed his normal life there. Entertaining visitors from his home town of Menominee, Michigan, he drove them in his automobile through the congested portions of the city of Los Angeles and around the mountains of that vicinity. Some of these activities are recounted

in the 26th Finding of Fact (Rec. 25). It appears that in February, 1921, the Hamiltons, friends of the decedent, visited Los Angeles where they saw the decedent six times and spent three days with him. They had dinner at his residence; the decedent took them in his automobile around the city and up in the mountains nearby. On these occasions the party would start at 9 or 10 o'clock in the morning, have lunch at 2 or 3 o'clock on the road, and return home about 5 o'clock. Decedent drove the car himself through the congested portions of the city, as well as around and over the mountains. At places on these mountain roads the automobile party, with the decedent at the wheel of the car, traveled roads that ran along a precipice where there was a sheer fall of six or seven thousand feet without any apparent concern on the part of the decedent. Hamilton saw no difference in the decedent's appearance. He was just as "spry" as he ever was and handled the car well. The decedent was also very cheerful.

It stands out clearly in this record that the decedent was an active, vigorous man, unimpaired by disease until April, 1921, the month in which his last illness began.

2. Findings of fact are made in respect of an asthmatic condition from which the decedent suffered during the last few years of his life, but it was also shown by the findings that this condition had nothing whatsoever to do with his death. It is a fact of common knowledge that many people have asthma for a long period of time without apprehension of death therefrom.

The cause of decedent's death is shown definitely to have been ulcerative colitis, an acute infection and inflammation of the lower bowel, accompanied by dysentery. In the Spring of 1920, on the occasion of the first attack of colitis, he was told by California physicians that he was suffering from cancer. Upon receiving this diagnosis, the decedent went at once to Chicago, Illinois, where he entered the Presbyterian Hospital. There he consulted Dr. Ralph Brown, a specialist in bowel diseases, who made a thorough examination of the decedent preliminary to a diagnosis. This was in June, 1920. Dr. Brown diagnosed the trouble as ulcerative colitis and explained to decedent in detail the nature of his ailment (9th Finding of Fact, Rec. 17). Dr. Brown assured the decedent "he would get well" (10th Finding of Fact, Rec. 17). The decedent's trouble yielded to treatment. By the 22nd of September, 1920, he was so improved that he could be and was discharged from the hospital on that date. His condition at that time was thus described: "Though he had not fully at that time recovered, but he did within the next two or three months." His appearance was then normal. He had gained an appreciable amount of weight and was in a fair state of health (14th Finding of Fact, Rec. 19). Throughout the fall and winter of 1920 the decedent's improvement continued so that he became fully able in those months to resume his normal activities. On October 30, 1920, he wrote his son Ralph, who was then in England, as follows (17th Finding of Fact, Rec. 20):

> "I am around about the same as usual. Went to Iron Mountains to see Wells Hallenbeck day

> before yesterday, from there next day to Dunbar and on home. I feel as well as ever, and bowels seem normal, but doctor says I must diet and take Bismuth medicine for awhile and be careful. Gained 6 pounds since I came home. * * *"

Regarding the physical condition of the decedent on February 3, 1921 (which was after all gifts involved in the present case were made), we quote the following evidence taken from the 26th Finding of Fact (Rec. 25):

> "He was vigorous and had an excellent color. He was having, and had had for months then, a normal bowel functioning. He was eating everything and, with the exception of the fact that his asthma had at that time not entirely cleared up, he considered himself well, and I told him that he need have no anxiety whatever about his state of health; that I considered him in excellent condition; that he need have no fears of any recurrence of the ulcerated colitis. As a matter of fact, my statement to him was justified by the fact that since he had left the hospital the preceding September, a matter of practically four months, he had enjoyed as normal a bowel function, I suppose, as the average man."

No clearer statement of what the decedent thought of his own condition could be made than that which appears in the 15th Finding of Fact (Rec. 19). The morning of his return to his Menominee home in September, 1920, he went to the offices of the lumber company. There he saw his son, Artemus Wells. He

told his son he was completely cured of the trouble he had had and that he felt good, but said he was going to be careful what he ate.

In the Fall of 1920 his condition of health was so far improved that he was able to undergo an operation at the Presbyterian Hospital on his nose, designed to clear up the asmathic condition.

Prior to his discharge from the hospital the decedent wrote his son Ralph as follows: "The doctors say I will be absolutely cured if I am careful for two or three months after leaving, and I certainly will be careful after this" (13th Finding of Fact, Rec. 19).

Quoting further from the opinion of the lower Court (Rec. 34):

> "Upon his discharge from the hospital in September he returned to his home in Michigan; assured his son Artemus Wells, who had been in charge of the J. W. Wells Lumber Company during his absence, that he was completely cured of his trouble and that he felt good, but said that 'he was going to be careful of what he ate'. He resumed his normal business activities, was at the office of the Wells Lumber Company every day; attended to his correspondence, worked on his books, and was apparently in his usual health. He visited with his friends as usual and made one or two business trips outside the State."

The conclusion is irresistible that all apprehension of death on the part of the decedent from ulcerative colitis had been removed prior to the pivotal months of December, 1920 and January, 1921.

3. While in California, about the middle of April, 1921, the decedent had a recurrence of ulcerative colitis. The local physician diagnosed the case as ulcerative colitis and so treated the decedent for some weeks. Because the decedent's trouble did not yield to treatment, the physician told him that he feared he might have a cancer, whereupon Mr. Wells telegraphed Dr. Brown that he was coming to Chicago at once. He did so, arriving in Chicago on June 5, 1921. As a result of this second attack of ulcerative colitis, he was a very sick man at the time of his arrival at the hospital. He gradually grew worse, and died as a result of this disease on August 17, 1921. An autopsy, made immediately after his death, confirmed the diagnosis of ulcerative colitis, with no trace of cancer.

Considering all the facts and circumstances, evidencing what the decedent said and did in the fall and winter of 1920-1921, it is, we suggest, not possible to conclude that the decedent's last illness, occurring as it did in April-August, 1921, could have been foreseen by him or anyone else in December, 1919, December, 1920, or January, 1921, when the transfers involved in this case were made.

4. The decedent had a fixed purpose respecting gifts to his five children. As early as 1901 he began making gifts to his children. "He kept a set of books on which he charged to the several children some but not all of the amounts transferred to them. These books of account, which are wholly in the decedent's handwriting, record many items of varying amounts—from a dollar or two to more than $30,000—to represent ad-

vancements by the decedent to his children in 1901 and subsequent years" (4th Finding of Fact, Rec. 15).

In the accounts with the children, the decedent charged each child with 5 per cent interest on the gifts made to him or her, as a step in the equalizing of one with the other (24th Finding of Fact, Rec. 24).

As the children advanced in years—and presumptively in their ability to take care of what was given them—the amounts of the gifts increased. To illustrate: In 1918 he gave to three of the children certain shares of stock in a railway company, charging them collectively on account thereof with $76,380 (7th Finding of Fact, Rec. 16). On December 24, 1919, he gave two of his sons stock of the lumber company, charging them with $103,808. In December, 1920, he decided upon, and took immediate steps to carry out, additional gifts to his children. These, with the gifts made on December 24, 1919, are the transfers involved in the present case. The later gifts (effectuated in January, 1921) represented shares of stock valued at $679,095.

Prior to the equalization of the children by the decedent, he had charged them with advancements in the aggregate amount of $1,063,644 (24th Finding of Fact, Rec. 24). On a financial statement prepared by him and given to a Chicago bank on December 21, 1920, the decedent penned in red ink: "I have made presents to my family of large amounts of stocks and cash for several years. J. W. Wells." In this statement the stocks transferred to the children on December 31, 1920, were not included (20th Finding of Fact, Rec. 22).

The following facts are, we believe, not open to dispute: The policy of the decedent with reference to gifts to his children had been a liberal one for many years prior to his death; this policy found expression in substantial gifts to his children as far back as 1901; it continued down through subsequent years to and including the month of January, 1921; the making of the gifts involved in the present case was entirely consistent with the decedent's policy on this subject, formed many years before his death. At the expense of some repetition, we point out that as late as 1918 the decedent advanced to his children certain shares of stock of a railway company, for which he charged them collectively with $76,380 (7th Finding of Fact, Rec. 16). It has not been claimed by the Commissioner of Internal Revenue that these transfers were made in contemplation of death. Yet, those made in December, 1919, and one year later were merely the expression of a policy adopted and continued through the preceding eighteen years of his life. On this point the Court below said (Rec. 36):

> "The plaintiffs have not only overcome the presumption created by the statute that the transfers were made in contemplation of death but have definitely established the fact, that the immediate and moving cause of the transfers was the carrying out of a policy long followed by decedent in dealing with his children of making liberal gifts to them during his lifetime. He had consistently followed that policy for nearly thirty years and the three transfers in question were a continuation and final consummation of such policy. In the last transfer

such amounts were given to his children as would even them up one with another, in the gifts and advancements made to them.

"That this was the motive which actuated the decedent in making these transfers seems unquestioned. He repeatedly, in letters to his children and in statements to business associates at about the time the transfers were made, gave this as his reason for such transfers."

5. To members of his family and close friends, the decedent explained his policy respecting gifts to his children. For a considerable period of time the decedent was associated in business with the late Senator Stephenson. Mr. Stephenson's policy, it seems, in the matter of gifts to his children, was not liberal. About the time of his (Stephenson's) death, the decedent defined his own policy in unmistakable terms. He said that the proper thing for a man of wealth to do was to give his children substantial sums of money during his lifetime, when he could advise with them as to the proper use they should make of it; that the contrary policy was a great mistake. About this, to one of his friends he said: "I am making distribution from time to time of part of my property to see what my children will do during my lifetime, and I will then know, when my time is up, what I ought to do with the balance" (4th Finding of Fact, Rec. 15).

6. The decedent's son Artemus managed the J. W. Wells Lumber Company when he, decedent, was away from his Menominee home. In December, 1919, he decided to increase the interest of this son Artemus in

that company. He transferred to Artemus at that time 343 shares of the stock of the company, giving also to his eldest son Daniel 73 shares of the same stock. The stock so transferred to the two sons had a value at the time of decedent's death of $103,808. These transfers were included in the taxable estate by the Commissioner of Internal Revenue, although they occurred some four or five months before the first attack of ulcerative colitis. Will it be contended here that the decedent could have foreseen in 1919 that he would in the following April become a sufferer from a serious ailment?

In point of fact, at the time the decedent transferred to his two sons the stock in the J. W. Wells Lumber Company, aside from the asthmatic condition he had been in excellent health for years, and there is not the slightest basis for a contention that he then apprehended his early demise.

7. The findings of fact disclose affirmatively and definitely the motivating cause of the transfers made by the decedent to his children in December, 1920, and January, 1921. There should be no contention on this point. The motivating cause of these transfers was the desire of the decedent to equalize his children, one with the other, in the gifts he had previously made to them. He so wrote his daughter Edna on February 3, 1921. In this letter he said (25th Finding of Fact, Rec. 24):

> "I have been working on my books and evening up all your accounts. Dan, Art, and Ralph have had advances that were more than you and

> Florence had and I have equalized one with the other by charging each with what they have had and charging them interest on the account to date, and the inclosed sheet shows what each has had, and how I equalized your a/cs by giving stock to even."

By an early will and also by the will made by the decedent while he was in the hospital in the Summer of 1920, the decedent provided for the equalization after his death of his children in the advances he had made them. An important consideration suggests itself at this point. The decedent had been told immediately prior to his coming to the hospital in June, 1920, that he was suffering from cancer. The effect of this information upon the decedent is to be taken from the following facts:

(*a*) He did not accept the diagnosis but rather sought the advice of a specialist nearer his Michigan home.

(*b*) Before he had received the diagnosis of the specialist, he made a settlement with his wife which, by its terms, became effective upon his death. He also revised his will to accord with the terms of the settlement contract.

(*c*) He made no gifts whatsoever to his children during the interval from the date of the receipt of the diagnosis of the California physician to the date on which he was assured by the Chicago specialist that his trouble was not cancer, but was rather ulcerative

colitis, from which he would recover. So long as he stood in the shadow of the advice of the California physician, he made provisions consistent therewith, viz., a settlement with his wife effective upon his death and the revision of his will. Here was a brief period during which it might be said that he acted in contemplation of death. What he did and what he failed to do during that period throw light upon the ultimate fact to be found in the present case.

(*d*) It was not until all fear of death from cancer had been removed by his restoration to normal health that the decedent decided to equalize his children during his lifetime. Here, he was concerned not with death, but with life and living.

We have, in the findings of fact on these points, a key to the entire situation. So long as the decedent had reason to apprehend his early death, he made provisions consistent with that apprehension. Not until all reason for fear of death in the near future had been removed did he make the gifts of December, 1920, and January, 1921, involved in the present case. The making of these gifts was consistent with his policy respecting advancements to his children inaugurated as far back as 1901.

8. After deducting all transfers, the taxable estate retained by the decedent aggregated $881,314.61. The decedent's annual income from the property retained by him was approximately $50,000 per annum, which was more than sufficient for his needs.

The lower Court did not err in its definition of the term "contemplation of death."

The opinion of the Court below is, we suggest, its own best defense.

In the petition for the writ of certiorari, petitioner quotes one sentence of the opinion and says that it incorrectly defines the term, "contemplation of death". The definition so quoted was this (Rec. 3):

> "Applying these facts to the rule that the term 'contemplation of death' does not mean that general knowledge of all men that they must die, but that there must be a present apprehension from some existing bodily or mental condition or impending peril, creating a reasonable fear that death is near at hand, and that such reasonable fear or apprehension must be the direct or animating cause, and the only cause of the transfer, it seems quite clear to us that the transfers in question were not made in contemplation of death." (39 F. (2d) 998, 1011.)

We next quote the specification of errors appearing in the petition for certiorari (Rec. 3):

> "The Court below erred—
>
> "1. In holding that 'contemplation of death', as used in 402(*c*) of the revenue act of 1918 is limited to 'a present apprehension, from some existing bodily or mental condition or impending peril, creating a reasonable fear that death is near at hand.'
>
> "2. In holding that 'a transfer made in contemplation of death', as used in section 402(*c*)

of the revenue act of 1918, means a transfer of which a reasonable apprehension of death near at hand is the direct, animating, and only cause.

"3. In giving judgment for the respondents."

The phrase "contemplation of death" is used in the statute to denote a condition of mind existing at the time of the gift. It will not be contended, we assume, that error was made by the Court below in including the words "present apprehension" in the definition.

But was it correct to make part of the definition the clause, "from some existing bodily or mental condition or impending peril"? The words "impending peril" embrace such cases as these: A member of the armed forces of the nation on the eve of battle makes a gift in fear of what may come to him on the morrow; a man condemned to be executed for crime, with the date of the execution fixed, may dispose of his property in contemplation of that event.

In the present case there was no such impending peril, and the words were simply left in the definition which was taken from a number of decisions, to some of which reference will be made in this brief.

We come next to the clause, "from some existing bodily or mental condition". Was it error to so limit the cause of the apprehension? Contemplation of death, as we have said, is in the mind of the decedent. It is a mental state. What, may it be said, is the cause of that mental state in the case of an active man 72 years of age? There can be but one answer: The actual or imagined presence of some mental or bodily disease which will take him away in the near future.

In the large majority of cases death is attributable to mental or bodily disease and, quite naturally, one attributes the cause of death to disease of one or the other class.

The position here taken is fully supported by the regulations of the Bureau of Internal Revenue. The regulations relating to the estate tax in force at the time of the decedent's death are Regulations 37, revised January 21, 1921. We take the following therefrom: "The words 'in contemplation of death' do not refer to the general expectation of death which all persons entertain. A transfer, however, is made in contemplation of death whenever the person making it is influenced to do so by such an expectation of death *arising from bodily or mental conditions,* as prompts persons to dispose of their property to those whom they deem proper objects of their bounty * * *." This definition was continued in substantially the same form in Regulations 63 (under the Revenue Act of 1921), Regulations 68 (under the Revenue Act of 1924), and Regulations 70 (under the Revenue Acts of 1926 and 1928). We quote the definition appearing in Regulations 70, which evidences the present attitude of the Bureau on this subject:

> "The words 'in contemplation of death' do not mean, on the one hand, a general expectation of death such as all persons entertain, nor, on the other, is the meaning limited to an expectation of immediate death. A transfer, however, is made in contemplation of death whereever the person making it is influenced to do so by such an expectation of death, arising from

> bodily or mental conditions, as prompts persons to dispose of their property to those whom they deem proper objects of their bounty. Such a transfer is taxable, although the decedent parts absolutely and immediately with his title to and possession and enjoyment of the property."

"Creating a reasonable fear that death is near at hand"—is this clause properly included in the Court's definition? It will be noted at once that the definition does not limit the contemplation-of-death cases to those where there is an expectation of *immediate* death. It therefore is not inconsistent with the clause "nor is the meaning limited to an expectation of *immediate* death", appearing in Regulation 70. The limitation stated by the Court below is that of an expectation of death, "near at hand".

What is the office of these words in the clause? Manifestly the Court undertook by their use to distinguish between an apprehension of death in the near future and the apprehension that we all have of death whenever it may come. This is entirely apparent from the fact that the Court adopts the following language from the opinion of the Court of Claims in Meyer *v.* United States, 60 Ct. Cls. 474: "If it be said that there need not be a conviction that death is imminent, there must at least be a belief that it is to be expected in the very near future rather than in the usual course of events".

Finally, the second assignment of error points to the clause "that such reasonable fear or apprehension

is the direct or animating cause and the only cause of the transfer * * *". Is this a correct statement of the law?

Nothing in the clause is inconsistent with the regulation of the Bureau of Internal Revenue, above quoted, although the phraseology of the two definitions differ. The Court below uses the words, "direct or animating cause", implying merely a direct, causal relation between the fear of death and the making of the gifts, *i. e.*, the usual relation of cause and effect. The regulations require that the decedent shall be *influenced* to make the transfer by the expectation of death, which is only another way of stating the same relation of cause and effect.

Nor do the regulations state that there may be other influencing causes without taking the case outside of the contemplation-of-death class; but aside from this consideration, the clause under discussion has received repeatedly the approval of the Courts and that of the Board of Tax Appeals, as we shall see presently.

In the case of Hannah M. Spofford, 3 B. T. A. 1016, 1020, the Board of Tax Appeals defined the term "contemplation of death" as follows:

> " 'Contemplation of death', as used in the statute, is an apprehension of death within the reasonably near future, arising from some existing bodily condition, and not the general expectation of death entertained by everyone. Contemplation of death must be the motive prompting the transfer of property in order to subject the transfer of property to the tax. Appeal of Philip T. Starck, 3 B. T. A. 514."

In the case so cited (Philip T. Starck, 3 B. T. A. 514, 519) the Board used this language:

> "Webster's Unabridged Dictionary defines 'contemplation' as the act of looking forward to an event as about to happen; expectation; act of intending, purposing, or considering, hence, intention; consideration; etc.
>
> "An act may well be performed in contemplation of death at some time in the future and yet not be in contemplation of death within the meaning of that phrase as used in the statute. The intention of Congress in the enactment of section 402 of the Revenue Act of 1918 was to provide for the inclusion in the gross estate of the value of any property concerning which the decedent made a transfer, except for a fair consideration in money or money's worth, in contemplation of death within a reasonable time in the near future, as distinguished from the general expectation of death entertained by everyone."

In the case of Phillips, Executor *v.* Commissioner, 7 B. T. A. 1054, 1058, also a contemplation-of-death case, the Board observed:

> "It may be well that when the conveyances in question were made Joseph N. Phillips contemplated death at some time in the future, but men perform acts daily with the knowledge that death may overtake them any moment. Men all wish to accomplish certain things before that fateful day and in that sense things may be done in contemplation of death, but this general and certain knowledge that to all death cometh soon or late is not what is meant by the phrase

'in contemplation of death' as used in the Revenue Act."

The conclusion of the Board in the case of Gimbels, Executors, *v.* Commissioner, 11 B. T. A. 214, 231, was stated as follows:

> "From a consideration of all the facts in this case we are of the opinion that in making the gifts, Gimbel had no expectation, belief or apprehension that his death was near at hand or might occur in the reasonably near future. Inasmuch as the decedent did not have such a belief, expectation or apprehension, we think the gifts were not made in contemplation of death, within the meaning of that phrase as used in the Act."

The meaning of the term "contemplation of death" was also clearly defined by the Board in the case of United States Trust Company, Executor, *v.* Commissioner, 14 B. T. A. 312, 316, in this language:

> "This provision, which is the same in the Revenue Acts of 1918 and 1924, has been before the Board and the courts in many cases and the construction uniformly applied is that by the term 'contemplation of death' is meant an apprehension of death within the reasonably near future from some existing bodily or mental condition, and not the general expectation of ultimate death entertained by everyone, and that such contemplation of death must be the motive which prompted the transfer and without which the transfer would not have been made, in order to include the transferred property in the estate of the decedent subject to tax. Illinois

> Merchants Trust Co., Executor, 12 B. T. A. 818; Isaac Gimbel *et al.*, Executors, 11 B. T. A. 214; Philip T. Starck, Executor, 3 B. T. A. 514; Hannah M. Spofford, Administratrix, 3 B. T. A. 1016; Spencer Borden, Jr., Executor, 6 B. T. A. 255; Anna Serrien, Executrix, 7 B. T. A. 1129; Spreckels *v.* State, 158 Pac. 549; 30 Cal. App. 363; Rea *v.* Heiner, 6 Fed. (2d) 389; Meyer *v.* United States, 60 Ct. Cls. 474."

The same construction of the term appears in somewhat different language in Flannery *v.* Willcutts, 25 Fed. (2d) 951, 953 (C. C. A. 8), where the Court said:

> "We are also in accord with counsel's statement in his brief that the cases 'hold that the thought of death must be the actuating motive without which the gift would not have been made'—adding thereto the qualification that the 'thought of death' as an anticipation of the inevitable which we all realize, is not within the statute, but to be within the statute the thought must arise because of some known infirmity which, it is believed, will likely cause death."

The definition of "contemplation of death" assigned as error by petitioner was really adopted by the Court below from Rea, Executor, *v.* Heiner, Collector, 6 Fed. (2d) 389 (U. S. Dist. Ct., Pa.), from which the following is taken:

> "In Spreckels *v.* State, 30 California App. 363, the court said: 'A reasonable and just view of the law in question is that it is only when the transfers of property by gift are immediately and directly prompted by the expectation of death, that the property so transferred becomes

amenable to the burden, or, as counsel for the respondents with singular aptness stated the proposition: *"It is only when contemplation of death is the motive without which the conveyance would not be made, that a transfer may be subjected to the tax.* That is, the expectation of death must be the direct, specific, and immediate animating cause of the transfer." '"

Continuing, the Court said:

"'In harmony with these opinions may be cited Conway's estate, 120 N. E. (Ind.) 717; Rosenthal *v.* People, 211 Ill. 306; Trust Company *v.* Stevens, 209 Mass. 373; Commonwealth *v.* Fenley, 189 Ky. 480, and many other cases.

"'These principles have been applied with great uniformity in the adjudicated cases, both in the State and Federal Courts. There is a common agreement that the words 'contemplation of death' is not the general knowledge of all men that they must die; that it must be a present apprehension from some existing bodily or mental condition or impending peril, creating a reasonable fear that death is near at hand; and that so arising, it must be the direct and animating cause, and the only cause, of the transfer. If this apprehension so arising, is absent, there is not that contemplation of death intended by the statute, *especially when another adequate motive actuating the gift is shown.*"

Perhaps no case involving transfers alleged to have been made in contemplation of death has been cited so often with approval—and never with disapproval—by other courts and by the Board of Tax Appeals as the case just cited.

In the earlier case of Meyer *v.* United States (60 Ct. Cls. 474) the Court of Claims had occasion to define the term. It did so in this language:

> "A review of the authorities is scarcely necessary to sustain the proposition that the contemplation of death referred to in the statute is not that contemplation of death which must be present with all of us, mindful of its certainty, at some time, we know not when, but it is that state of mind which by reason of advanced age, serious illness, or other producing cause induces the conviction that death in the near future is to be anticipated. If it be said that there need not be a conviction that death is imminent, there must at least be a belief that it is to be expected in the very near future rather than in the usual course of events. And in this state of mind, in this belief in the near approach of death, must be found the motive for the conveyance if it is properly to be characterized as made in the contemplation of death."

In State *v.* Thompson, 154 Wis. 320, the Supreme Court of Wisconsin thus discusses the rule on this subject:

> "An act is not done in contemplation of death when the feeling that dissolution is approaching is absent and is not the cause which impels or prompts the doing of the act. An aged person in good health who has acquired a competence and who desires to retire from active life may desire to distribute a portion of his accumulations among his children without any thought of impending death. He may derive genuine enjoyment from seeing them enjoy the

fruits of his accumulations if they put them to good use and may take pleasure in giving his advice or counsel as to how the business or property turned over should be managed or handled. "The question of whether such a person may have a few or many years to live is not a consideration that has entered into or affected the transaction. He does not give because he is anticipating death, but because it affords him a pleasure in life."

Even though it be found by the Court that objection may properly be made to some portion of the definition of the term "contemplation of death" it would not follow, we suggest, that the judgment appealed from should be reversed.

It was not claimed in the petition for certiorari that the finding of ultimate fact, *i. e.*, that the gifts were not made in contemplation of death, was not supported by the primary facts found by the lower court. The sole error complained of in the petition related to the court's definition of "contemplation of death."

If this case had originated in the United States District Court and there had been a verdict of no contemplation of death by a jury, the error assigned might turn upon the trial court's interpretation of the law in its charge to the jury. It is, however, a well settled rule that even in cases of that sort, it is a complete answer to show that the error, if made, was not prejudicial. So, in the present case, we suggest that if any portion of the definition be objectionable the further inquiry should be made as to whether the objection-

able portion had any effect upon the finding of ultimate fact by the court below.

It is immaterial in the present case whether the definition of "contemplation of death" may properly include the clause, "a present apprehension * * * creating a reasonable fear that death is near at hand." The findings of fact establish affirmatively that no such apprehension was entertained by the decedent at the time he made any of the gifts involved here. After his discharge from the hospital in September, 1920, and before he departed for California in February, 1921, the decedent, by word of mouth and by letters, expressed the conviction that he was cured of the bowel disease from which he had been a sufferer during the preceding summer. The doctor, in whom he had every confidence, so informed him, advising him, however, as a precautionary measure, to be careful of his diet. On January 26, 1921, which was immediately after the latest gifts were consummated, the decedent penned these words to his son Ralph, "The doctors pronounce me cured of bowel trouble * * *."

We confidently submit that there was no primary fact from which an inference could have been drawn that in December, 1919, December, 1920, or January, 1921 (the pivotal months of the present case), the decedent had the slighest apprehension that his death was "near at hand."

The same conclusion is to be reached regarding the second assignment of error in the petition for certiorari, which asserts error in the use and in the definition of the clause, "it must be the direct or animating cause and the only cause of the transfer." The mo-

tivating cause of the transfers in the present case was shown affirmatively to have been something other than contemplation of death.

For the transfers of December, 1919, the cause was shown to have been the desire to give to the son Artemus a larger interest in the business he was managing.

For the transfers made in December, 1920, January, 1921, the motivating cause was the decision on the part of the decedent to equalize his children in his gifts to them, in his lifetime, so that he might counsel with them as to the investment and use of the property entrusted to them. This decision by the decedent was reached and carried out after he had been assured by his attending physician that he had fully recovered from the ulcerative colitis attack of the preceding summer, and after he had resumed his normal business activities and was planning his customary winter trip to California.

These were the findings of fact relating to the motivating cause of the transfers; and it is entirely clear that contemplation of death was neither the sole nor one of the contributing causes thereof. This being true, we suggest that the clause of the definition relating to causation had no influence upon the decision of the lower court, and therefore could not have been prejudicial to petitioner in the present case.

Our view is that:

(*a*) There is no conflict between the finding of ultimate fact and any of the findings of primary facts;

(*b*) The finding of ultimate fact of no contemplation of death irresistibly follows from the findings of primary facts made by the court below;

(*c*) The court below inevitably would have made the same finding of ultimate fact if there had been no consideration of the case of Rea *v.* Heiner, Collector, 6 Fed. (2d) 389, from which the definition of "contemplation of death" complained of was taken.

Perhaps it may not be out of place to conclude this discussion with a reference to two or three decisions of this court as additional illustrations of its attitude toward findings of fact, primary and ultimate, of the Court of Claims.

In the case of Hathaway *v.* United States, 249 U. S. 463, the question before the Court of Claims was whether the delay of the contractor had been excused by the delay of the Government. The decision was in favor of the Government. On appeal, this Court said:

> "The court of claims found: 'There was no unreasonable delay on the part of the government in approving the contract.' This finding, like one of reasonable value (Talbert *v.* United States, 155 U. S. 45, 46, 39 L. ed. 64, 15 Sup. Ct. Rep. 4), is a finding of an ultimate fact by which this court is bound, unless it appears that the finding was made without supporting evidence (William Cramp & Sons Ship & Engine Bldg. Co. *v.* United States, 239 U. S. 221, 232, 60 L. ed. 238, 242, 36 Sup. Ct. Rep. 70; Stone *v.* United States, 164 U. S. 380, 41 L. ed. 477, 17 Sup. Ct. Rep. 71; United States *v.* Clark, 96 U. S. 37, 24 L. ed. 696), or is inconsistent with other

facts found (United States *v.* Berdan Fire-Arms Mfg. Co., 156 U. S. 552, 573, 39 L. ed. 530, 537, 15 Sup. Ct. Rep. 420)."

Similarly, in the case of Ley & Company *v.* United States, 273 U. S. 387, this Court held:

> "It is urged that the records in those cases show a blanket approval by the government of the expenditures made for liability insurance in the construction of all the Army cantonments. But the court of claims specifically found that there was no evidence that the present expenditure was required or approved. By that finding we are concluded."

We also cite the decision of this Court in Saalfield, Adm'r of Brown *v.* United States, 246 U. S. 612. The annotations of this decision in 62 Law Ed. 895 *et seq.* collate all earlier rulings on the question of the conclusiveness of the findings of fact of the Court of Claims on appeals to this Court.

For these reasons we respectfully ask for an affirmance of the decision of the Court of Claims in the present case.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 252

THE UNITED STATES, PETITIONER,

v.

ARTEMUS C. WELLS ET AL., EXECUTORS OF THE ESTATE OF JOHN W. WELLS, DECEASED, RESPONDENTS.

REPLY BRIEF FOR RESPONDENTS.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 252

THE UNITED STATES, PETITIONER,

v.

ARTEMUS C. WELLS ET AL., EXECUTORS OF THE ESTATE OF JOHN W. WELLS, DECEASED, RESPONDENTS.

REPLY BRIEF FOR RESPONDENTS.

MAY IT PLEASE THE COURT:

We take the liberty of submitting a few suggestions by way of reply to the brief for petitioner. At the time of the preparation of the original brief for respondents a copy of petitioner's brief had not been received by counsel for respondents.

1. In the brief for petitioner it is emphasized that the decedent was more than 70 years of age when he made the gifts in question; and we understand that the

argument of counsel upon the facts of the case is predicated, at least to some extent, upon the decedent's age. We quote the following from the brief for petitioner (p. 6):

> "The Act provides that all gifts made within two years of death are presumed to have been made in contemplation of death unless the contrary is shown. Various types of evidence are available to the taxpayer for the purpose of rebutting this presumption. Of these the fact that the donor was in good health is only one, and is not sufficient to overcome the presumption if the donor was so far advanced in years that death could not, in the nature of things, be far away."

We quote further from the brief for petitioner (p. 16):

> "Perhaps the most common bodily condition which prompts persons to dispose of their property by transfers testamentary in nature is that of advanced years. As the Prerogative Court of New Jersey said in *In re Bottomley's Estate*, 92 N. J. Eq. 202, 208, When a man has passed 'the scriptural mark of three score years and ten', he must necessarily look upon death as being 'not on the horizon of life but in its foreground, and, perhaps, very near'. It is a bodily condition which induces that frame of mind, and existing freedom from a specific illness does not necessarily neutralize it."

And, finally, from page 28 of the brief for petitioner:

> "We submit the facts show that in making all three transfers, the decedent was actuated by the thought of death and its consequences. It

is true that in 1919 he was free from illness, but it is also true that he was at that time almost 72 years of age. If, as we contend, a condition of ill health does not constitute the final test, and age is a bodily or mental condition such as may induce a man to make a final disposition of his property, then we submit that the presumption has not been successfully overcome."

We think that this contention of counsel may be best answered by the opinion of the Supreme Court of Wisconsin in State of Wisconsin *v.* Thompson, 154 Wis. 320. That case involved the question of whether certain transfers were made by the decedent, Joseph Dessert, in contemplation of death. The court of first instance held the transfers to have been made in contemplation of death, but this decision was reversed by the Circuit Court. The latter decision was affirmed by the Supreme Court. The earlier gift involved in that case was made four and one-half years prior to the death of the decedent, and the later gift, a few days less than three years before his death. All of the gifts were made to the daughter of the donor and her husband. Mr. Dessert was 86 years of age at the time he made the earlier of these gifts; but he was enjoying good health and his mental faculties were unimpaired. The contentions of the State in the cited case were these:

"(1) The gifts were substantially in accordance with the will of the deceased, made in 1891;

"(2) They included more than ⅔ of the large estate;

"(3) The deceased had reached an extreme old age;

"(4) He had surrendered the management of his property and his business."

After referring to the earlier case of State of Wisconsin v. Pabst, 139 Wis. 561, the Court said:

> "The definition of the words 'in contemplation of death' given in the *Pabst* case does not differ from that announced by the New York court in re *Baker's Estate*, 83 App. Div. 530, 82 N. Y. Supp. 390; affirmed 178 N. Y. 575, 70 N. E. 1094, where it is said 'this court has held that the words "in contemplation of death" do not refer to that general expectation which every mortal entertains, but rather the apprehension which arises from some existing condition of body or some impending peril'. Neither does it differ from the interpretation put upon the words by the Illinois Court in *People v. Burkhalter*, 247 Ill. 600, 604, 93 N. E. 379, 139 Am. St. Rep. 351, where it held that contemplation of death must be the impelling motive for making a gift in order that it be subject to an inheritance tax."

Answering the contentions of the State, the Court said:

> "It is only gifts made in contemplation of death that are taxable. A parent has the right to give his property to any proper subject of his bounty, freed from any transfer tax, provided the contemplation of death is not the cause which impels the making of the donation.

"It is apparent therefore that it would be illogical to hold that proof that a person was aged when he made a gift conclusively establishes that it was made in contemplation of death. This could not be true if the donor might be actuated by any other motive. Common knowledge and experience teach us that aged people frequently give property to their children because of their desire to help them, and without any thought in reference to their own deaths. Mr. Carnegie is an old man in years. He has given away what would make several princely fortunes. It could not be fairly said that the feeling that he must soon die was the cause that actuated him to give. Instead, it was the pleasure of bestowing a part of his fortune where he conceived it would accomplish much for the uplift and betterment of mankind by furnishing useful and helpful reading matter free of charge.

"This brings us to the last question in the case, and that is whether the age of Mr. Dessert was so great when the gifts in question were made as to establish the fact that they were made in contemplation of death. If there is room for conflicting inferences, the decision of the circuit court must stand. The deceased was 86 years old when he made the first of the large gifts and a year and a half older when the second one was made. He died at the age of 92, being sound and active in mind and body until three months before his death. The evidence all tended to show that his physical and mental faculties remained unimpaired until his last illness, except that he was somewhat deaf.

"We do not think the court can fix any particular age limit, and say that after it is reached

a party can give his property away only in contemplation of death. In a sense, 'old age' is a relative term. Some men are old at 60, although they may have no organic disease. Others are vigorous in mind and body at 70, and still others long after they have passed their eightieth milestone. There are octogenarians among the members of the Dane county bar at the present time. One is as actively engaged in his professional work as he was 25 years ago. Another is creditably administering the affairs of an important office. The third is retired from active labor. Chief Justice Fuller performed his arduous labors until he reached the age of 77. Justice Harlan did likewise until he was 78. Justice Field until he was 83, and Chief Justice Taney until he was past 87. The venerable Ex-Chief Justice Lyon of this court recently died at the age of 91, retaining his bodily and mental vigor until a short time before his death. Ex-Speaker Cannon, now past 77, is an antagonist who might well command both fear and respect in any forensic encounter in which he might see fit to engage.

"Age in itself is not a very important factor in determining the capacity of persons to deal with their property or in ascertaining the motives which actuated them in disposing of it. The deceased in this case might have made the gifts which he did because he expected to die at any time. *But it was just as reasonable an inference for the trial court to draw that he made the gifts without any particular thought of death and because he wanted his daughter and her family to enjoy the benefits of a part of his accumulations and to see her and them use what*

> *was given while he was still alive so that he could observe the uses to which it was put.* It is an erroneous concept to conclude that aged persons dispose of their property because they think that death is staring them in the face. The hypochondriac or the pessimist might entertain such an idea, but such a one rarely attains old age. On the contrary, we think it is true that persons who have lived long and who are free from disease generally entertain the feeling that they have a few years longer to live, no matter how old they are, and that they do not regard death as imminent. We are not disposed to say in the instant case that the circuit court did not draw an entirely correct inference from the testimony, much less to say that its decision should be set aside."

2. It is stated as a proposition in the brief for petitioner (p. 17):

> "The presumption that a gift made within two years of death was made in contemplation of death can be overcome only by proof that the donor was actuated by a desire to achieve some purpose during his lifetime as distinguished from one related primarily to the devolution of his estate at death."

We understand that by this proposition counsel intend to emphasize the distinction between a "desire to achieve some purpose during his lifetime" and a desire relating "primarily to the devolution of his estate at death". In the course of the discussion of this proposition, the brief for petitioner asserts (p. 20):

"In those cases in which the transfers have been held not in contemplation of death there has always been proof that the donor wished to accomplish some purpose during his own lifetime and was induced by such a desire to make the gift. Thus transfers made for the purpose of relieving the donor of the cares of management or in order that his children may experience the responsibilities of business under his guidance and supervision have been held to be of that character. *Flannery v. Willcuts*, 25 F. (2d) 951 (C. C. A. 8th), *supra; Tips v. Bass*, 21 F. (2d) 460 (W. D. Tex.); *White v. Commissioner*, 15 B. T. A. 470; *Gimbel v. Commissioner*, 11 B. T. A. 214. Similarly, where the donor in order to reduce income taxes has transferred property to others, his purpose has been recognized as one pertaining to his lifetime and not in contemplation of death. *Vaughan v. Riordan*, 280 Fed. 742 (W. D. N. Y.), *supra.*"

In no case coming under our observation has it appeared that the donor stated more clearly than he did in the present case his purpose in making the gifts.

The purpose of any decedent in making a gift must be determined in the light of all facts and circumstances of the case. Material to this determination is the fixed policy and the philosophy of the decedent respecting gifts to those whom he regards as proper objects of his bounty. Naturally, we would scrutinize more carefully a gift of substantial size by a miserly father, one who had always given his children as little as possible, while we would regard as a matter of course a gift of the same size by a father who had

inaugurated twenty years before and had continued down through the years a policy of making liberal gifts to his children. The philosophy of the donor respecting the desirability of the continued ownership of property, *i. e.*, whether it is the *summum bonum* of life, may throw light on the purpose of the donor in any case. What in one case would give rise to speculation and doubt might readily be accepted as evidencing an unmistakable purpose in another.

Mr. Wells' policy and philosophy were all on the side of liberality and generosity to his children. His fixed policy was to make gifts to them during his lifetime. This purpose was conceived, not with the idea in mind *of death*, near or remote, but with the thought of accomplishing a definite purpose *in life*, viz, to assist his children in taking care of the property he gave to them. His avowed purpose was to give them the benefit of his larger business experience. We quote the 4th Finding of Fact (Rec. 15):

> "For a considerable period of time the decedent was engaged in the lumber business with the late Senator Isaac Stephenson, who died in or about the year 1918. It appears that Mr. Stephenson's policy in the matter of gifts or advancements to his children was not so liberal as that of the decedent. About the time of Mr. Stephenson's death this subject was discussed by the decedent with business associates.
>
> "The decedent expressed it as his opinion that the proper thing for a man of wealth to do was to give his children substantial sums of money during his lifetime while he could advise with them as to its proper use. He further ex-

pressed the opinion that some wealthy men who had recently died leaving estates had made a great mistake, and informed his friend Blom, 'I am making distribution from time to time of part of my property to see what my children will do during my lifetime, and I will then know when my time is up what I ought to do with the balance.'

"He frequently expressed his opinion that his friend, Senator Stephenson, had made a big mistake in not distributing his property to his children while he was alive to help them handle it properly and said 'that is not my policy'."

The inference of fact and the conclusion of the law of the Court below on this subject were (Rec. 36):

"The plaintiffs have not only overcome the presumption created by the statute that the transfers were made in contemplation of death but have definitely established the fact, that the immediate and moving cause of the transfers was the carrying out of a policy long followed by decedent in dealing with his children of making liberal gifts to them during his lifetime. He had consistently followed that policy for nearly thirty years and the three transfers in question were a continuation and final consummation of such policy. In the last transfer such amounts were given to his children as would even them up one with another, in the gifts and advancements made to them.

"That this was the motive which actuated the decedent in making these transfers seems unquestioned. He repeatedly, in letters to his children and in statements to business associates at about the time the transfers were made, gave this as his reason for such transfers."

Our conclusion, therefore, is that the case for the executors of Mr. Wells' estate fully meets the test laid down in the brief for petitioner.

It was here shown that the donor was actuated by a desire to achieve a definite purpose during his lifetime rather than by any thought regarding the devolution of his estate at death.

3. Reference is made in the brief for petitioner to the following provision of Regulations 37 of the Bureau of Internal Revenue (Brief for petitioner, p. 24):

> "The fact that a gift was made as an advancement, to be taken into account upon the final distribution of the decedent's estate, is not enough, standing alone, to establish taxability; but it is a circumstance to be considered in determining whether the transfer was made in contemplation of death."

While such was the provision of the regulations in force at the time of the decedent's death, it has since been modified under statutes containing substantially the same provisions as to gifts in contemplation of death as Section 402 of the Revenue Act of 1918. Not infrequently gifts to children are advancements and, evidently recognizing that the latter part of the above quotation was of doubtful correctness, the Bureau of Internal Revenue eliminated the clause "but it is a circumstance * * *" from the present regulations relating to gifts alleged to have been made in contemplation of death. The provision as it now appears in Article 16 of Regulations 70 contains merely this:

> "The fact that a gift was made as an advancement, to be taken into account upon the final distribution of the decedent's estate, is not, in and of itself, determinative of its taxability."

4. We notice the following contentions of counsel respecting the facts of this case:

(*a*) Emphasis is laid by counsel upon the fact or supposed fact that the decedent believed his father died of chronic dysentery during the Civil War. The facts pertaining to this matter are to be taken from the 6th Finding of Fact (Rec. 16), which reads as follows:

> "Mrs. Florence W. Law, one of decedent's daughters, testified that decedent's father died in the Civil War; that he was injured in the Civil War. The records of the Presbyterian Hospital, however, show that decedent, himself, in giving his family history on May 28, 1919, told the hospital authorities that his father had 'died of chronic dysentery'. With the exception of his father the decedent's family appears to be a long-lived one."

Upon this point counsel say (Brief for petitioner, p. 26):

> "The decedent had recently passed through a serious and painful illness and, although he had been pronounced cured, there must have been in his mind the thought that a man of his age, having once been afflicted with an ailment of that nature, must face the possibility that death was reasonably near at hand. The physical circumstances alone would justify this supposition, but we have the additional fact that

the decedent believed his father's death to have been caused by the same disease from which he himself had suffered."

From the Findings of Fact, it is not certain just what caused the death of decedent's father; and it is certainly a far cry from the above finding to the assumption that the decedent was influenced to make the transfers by the death of his father, which occurred almost sixty years before the events involved in the present case. There is, of course, no evidence that the "chronic dysentery" of the father, if indeed he had any such trouble, was the disease of colitis or any trouble similar to that from which the decedent suffered. It is a matter of common knowledge that disease-producing conditions during war times are so materially different from the corresponding conditions of peace times that it is difficult to draw any analogy between the two periods.

As shown by the Findings of Fact, at the time the last gifts were made by the decedent in the present case, he had completely recovered from the attack of colitis from which he had suffered during the preceding summer. At that time he had recovered his normal good health and was then engaged in his usual business activities. He was then planning his customary winter visit to Southern California. He had been told by his physician that he had recovered from the colitis attack of the preceding summer.

Will it be said that in December, 1920-January, 1921, he could foresee that he would suffer from an entirely new attack of the colitis trouble four months later, an

attack that was not foreseen or anticipated by his attending physician? Will it be said, further, that he foresaw not only that the attack would come again, but also that it would be fatal—this in the light of his recovery from a former attack? Is it given to man thus to foresee the future?

The following testimony relating to decedent's condition immediately after the last transfers were made, was embodied in the 25th Finding of Fact (Rec. 25):

> "He was vigorous and had an excellent color. He was having, and had had for months then, a normal bowel functioning. He was eating everything and, with the exception of the fact that his asthma had at that time not entirely cleared up, he considered himself well, and I told him that he need have no anxiety whatever about his state of health; that I considered him in excellent condition; that he need have no fears of any recurrence of the ulcerated colitis. As a matter of fact, my statement to him was justified by the fact that since he had left the hospital the preceding September, a matter of practically four months, he had enjoyed as normal a bowel function, I suppose, as the average man."

From this and other findings, the Court below made the following inferences of fact (Rec. 36):

> "After the final transfer in which the advancements and gifts to the children were evened up in January, 1921, the decedent still possessed property of the value of nearly $900,000, from which he drew an annual income of approximately $50,000. At the time the transfers were made, decedent had no reason to

believe otherwise than, aside from his asthma, he was, for a man of his age, in ordinary health. While he had gone through a most serious and painful illness, he had, as he believed made an almost complete recovery. He was assured of this fact by his physician, an eminent specialist, in whom he had great confidence. The repeated statements made by him to close friends and associates, his daily activities in matters connected with his business affairs, his letters to his children assuring them of his renewed health, show that he fully believed the assurances given him by his physician that he was cured and had nothing to fear on account of his former illness."

(*b*) We take the following from the brief for petitioner (pp. 26-27):

> "The optimistic statements which the decedent made to his family and friends are not necessarily indicative of his true state of mind. He had been an active man, living a busy life, and such men are not usually prone to admit to others—least of all to their immediate families—that they are no longer as vigorous as they used to be. Moreover, the decedent was much concerned with putting his affairs in order in anticipation of death."

The last statement is a conclusion which, we submit, is not supported by this record. As to the decedent's statement regarding the state of his health, we quote the following from the decision of the Court below (Rec. 36-37):

> "The presumption created by the statute that the transfers in question were made in contem-

plation of death cannot stand against ascertained and proven facts showing the contrary to be true. The best evidence of the state of the decedent's health at the time the transfers were made is the statement of his doctor. The best evidence of the decedent's state of mind at that time and the reasons actuating him in making the transfers are the statements and expressions of the decedent himself supported as such statements are by all the circumstances concerning the transfers. Decedent's physician says that at the time the transfers were made he was in normal health for a man of his age. *The decedent in letters to his children and in statements to his friends repeatedly assured them he had recovered from his former illness and was again enjoying reasonable health.* He also gave satisfactory reasons for making the transfers in question, which reasons are entirely consistent with all the other facts and circumstances surrounding the transactions and with the policy followed by him for many years in dealing with his children."

In effect, this Court is asked to find that the decedent did not believe what he told his close friends and what he wrote in his letters to his children concerning his own health. That is a finding that the Court below, a fact-finding tribunal, with all the evidence and the report of its own Commissioner before it, refused to make.

The interpretation of the term "contemplation of death" has been before many of the State courts. In

an appendix to this brief we include several of the decisions of State courts of last resort interpreting that term.

For these reasons, we respectfully ask for an affirmance of the decision of the lower Court.

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APPENDIX.

Decisions of State Courts in Contemplation-of-death Cases.

Matter of Baker, 83 App. Div. 530 (1903), aff'd 178 N. Y. 575 (1904) on opinion below:

Tax claimed under Laws of 1896, chap. 908, as amended by Laws of 1897, chap. 284—Subdivision 3 of sec. 220 of the General Tax Law:

> "This court has held that the words 'in contemplation of the death' do not refer to that general expectation which every mortal entertains, but rather the apprehension which arises from some existing condition of body or some impending peril (Matter of Spaulding, supra; aff'd 163 N. Y. 607); and this we believe is now the generally accepted definition of the phrase."

State v. Pabst, 139 Wis. 561 (1909):

Tax claimed under chap. 44, Laws of 1903, as amended by chap. 249, Laws of 1903.

> "The meaning of the words 'in contemplation of death' as used in the statute, must be inferred and ascertained from the context of the act and the object sought to be accomplished by the law. It is manifest that they were intended to cover transfers of parties who were prompted to make them by reason of the expectation of death and which, in view of that event, accomplish transfers of the property of decedents in the nature of a testamentary disposition. It is therefore obvious that they are not used as referring to that expectation of

death generally entertained by every person. The words are evidently intended to refer to an expectation of death which arises from such a bodily or mental condition as prompts persons to dispose of their property and bestow it on those whom they regard as entitled to their bounty. This accords with the general objects and purposes of the law, namely, the imposition of a tax on the devolution of property involved in the demise of the owner. * * *

"The claim that the words can include only gifts *causa mortis* attributes to them too restricted a meaning. A transfer valid as a gift *inter vivos*, if made under circumstances which impress it with the distinguishing characteristics of being prompted by an apprehension of impending death, occasioned by a bodily or mental state which has a basis for the apprehension that death is imminent, would be a transfer made in contemplation of death within the meaning of the law."

Spreckels v. State, 30 Cal. App. 363 (May 2, 1916):

The tax was claimed under Section 1 of the Acts of 1905, page 341, commonly known and referred to as the Inheritance Tax Law. The pertinent part of that statute reads as follows:

"All property which shall pass, by will or by the intestate laws of this state, from any person who may die seized or possessed of the same while a resident of this state, or if such decedent was not a resident of this state at the time of death, which property, or any part thereof, shall be within this state, or any interest therein, or income therefrom, which shall be transferred by deed, grant, sale or gift made in contemplation

> of the death of the grantor, vendor or bargainor, or intended to take effect in possession or enjoyment after such death, to any person or persons, * * * shall be and is subject to a tax * * *."

Mrs. Spreckels, who made the gifts in question, died February 15, 1910, prior to the enactment of the Amendment of 1911, referred to in the following quotation. The Court, in its opinion, pages 369-371, has the following to say relative to the meaning of the phrase "in contemplation of death":

> "First, it will be well to inquire into the legislative meaning and scope of the language, 'in contemplation of death', as that phrase is used in the statute. It certainly cannot justly be held that the purpose or the intention of the legislature was, by the law in question, to subject every transfer of property by gift to the burden of the inheritance tax. Obviously (in other words), the language referred to was not intended to include that general expectation of death which is the essential concomitant of the inherent knowledge of the inevitable termination of all life, and which is in the young and the physically robust as well as in the aged and the infirm. No similar statute has been so construed. A reasonable and just view of the law in question is that it is only where the transfer of property by gift is immediately and directly prompted by the expectation of death, that the property so transferred becomes amenable to the burden. Or, as counsel for the respondents with singular aptness states the proposition: 'It is only when contemplation of death is the motive without which the conveyance would not be

made, that a transfer may be subjected to the tax.' That is, the expectation of death must be the direct, specific, and immediate animating cause of the transfer. Or, as the proposition is perhaps the more lucidly explained as follows in Ross on Inheritance Taxation, section 117, referring to the words, 'in contemplation of death', as they are used in statutes authorizing the subjection of property transferred by gift to the burdens of an inheritance tax. 'They are intended to cover transfers of persons who are prompted to act by reason of the expectation of death and who thereby accomplish transmissions of property in the nature of testamentary dispositions. The words do not refer to that general expectation commonly entertained by all persons, but rather to that apprehension which arises from some existing condition of body or some impending peril.'

"Again, in Andrews on the Transfer Tax Law of New York, page 172, it is said: 'The statute was evidently intended to reach absolute transfers of property when made under certain conditions, viz., when the transferror was contemplating death. That is, the thought of death has taken so firm a hold on his mind as to control and dictate his actions regarding his property and the business is transacted while contemplating death and considering what conditions would arise or exist in the event of death without making the transfer, or, to be more specific, the contemplation of death is the sole motive and cause of the transfer; * * * but if made with other motives and for other causes it is not taxable no matter when made, as it cannot be presumed that the legislature intended to place any limitation upon the inherent right of

a person to give away his property whenever, and to whomsoever, he desires.'

"The views thus expressed upon the meaning of the words referred to are in harmony with those to be found in all the cases. (See *State v. Pabst*, 139 Wis. 561, (121 N. W. 351); *Rosenthal v. People*, 211 Ill. 309 (71 N. E. 1122); *People v. Burkhalter*, 247 Ill. 600 (139 Am. St. Rep. 351, 93 N. E. 379); *In re Dessert's Estate*, 154 Wis. 320 (Ann. Cas. 1915B, 1084, 46 L. R. A. (N. S.) 790, 142 N. W. 647).) And, as we understand the case of *Estate of Reynolds*, 169 Cal. 600, 603 (147 Pac. 268, 270), there is no expression therein with which the views above expressed conflict. In that case, Mr. Justice Henshaw criticises the construction put upon a similar statute of the State of New York by the courts of that state, it having at first been held by those courts that a transfer of property 'in contemplation of death' within the meaning of the Inheritance Tax Law of said state meant a gift *causa mortis*, and that the law was 'applicable to no other kinds or characters of transfers.' Judge Henshaw, referring to the New York decisions, said in the Reynolds case: 'Nothing in our law compels us to adopt the restricted construction put by the courts of New York upon their own statute and everything in our law directs that a liberal construction should be placed upon it to the end that its provisions may not be evaded.' The Reynolds case was decided in the year 1912 after the legislature of 1911 had, among other changes, added the following provision to our Inheritance Tax Law: 'The words "contemplation of death," as used in this act, shall be taken to include that expectancy of death which actuates the mind of a person on the execution of a

will, and in nowise shall said words be limited and restricted to that expectancy of death which actuates the mind of a person in making a gift *causa mortis;* and it is hereby declared to be the intent and purpose of this act to tax any and all transfers which are made in lieu of or to avoid the passing of the property transferred by testate or intestate laws.' This amendment, as was said of it in the Reynolds case, in no manner changed the law as it stood prior thereto, but its purpose and effect were merely to give a clearer expression to the legislative intent and meaning of the law, or to make certain that which might otherwise have been regarded as doubtful, viz., that the intent of the legislature was to subject to the tax all property transferred as a testamentary disposal thereof, whether such transfer was by gift *inter vivos* or by will and testament."

Commonwealth v. Fenley, 189 Ky. 480 (1920):

Court held that certain transfers were not taxable as having been made in contemplation of death. At pages 482-483 the court said:

"The anticipation or apprehension of death in the ordinary and natural course of events is not such contemplation of death as the statute has in view. The contemplation of death the statute speaks of is a present apprehension of death arising from some existing condition or impending peril that would reasonably create a fear that death was near at hand, as, for example, when the grantor is in bad health and the compelling thought of death is prominent in his mind, or when he is in the presence of or

there is fear or apprehension of some danger or peril that might reasonably and naturally produce an expectation of death.

"Of course, every person knows that at some time he will certainly die, and if this ever existing knowledge of death at some time in the future was the contemplation of death within the meaning of the statute then no person at any time during life could make a transfer of property by deed, grant, sale or gift that would not be subject to an inheritance tax, although the person making the deed, grant, sale or gift might be in perfect health at the time the transaction took place and live for twenty or thirty or fifty years thereafter. Certainly the statute does not intend and ought not be so construed as to subject to an inheritance tax gifts or transfers of property made under circumstances such as we have supposed, and it is a matter of common knowledge that many gifts and transfers of property are made when circumstances such as these exist.

"The statute was enacted primarily for the purpose of levying a tax on property passing by will or the intestate laws of the state from any person who might die seized or possessed of the same while a resident of the state, or, if not a resident of the state, whose property so passing was within the state. It was not intended to put a tax upon all transfers or gifts of property.

"The imposition of the tax upon transfers and gifts during the life of the grantor was only designed to prevent the primary purpose of the statute from being defeated or evaded by gifts or transfers that might be made when

death was reasonably believed to be impending, and therefore we think that when the Commonwealth seeks to tax under this statute property transferred by deed, grant, sale or gift it is incumbent upon it to show that the person making the deed, transfer, grant, or gift was by reason of the condition of his health or the presence of some threatening danger or peril seeking to dispose of his estate before death came, and so whether the estate is or not taxable is a question to be determined by the facts and circumstances of the particular case."

At page 484, the court further said:

"In 26 R. C. L., p. 225, the prevailing rule in the construction of statutes reading like ours is thus stated: 'It has sometimes been held that such statutes apply only to gifts *causa mortis*, and to gifts made for the purpose of evading the inheritance tax. But the sounder view is that the statutes apply to gifts *inter vivos* as well as *causa mortis*, provided they are made "in contemplation of death," that is, an apprehension of death arising from some existing bodily condition or impending peril and not the general expectation of eventual decease commonly entertained by all persons. The contemplation of death must be the impelling motive without which the conveyance would not be made in order to subject the transfer of property to the inheritance tax. Whether a gift is made in contemplation of death so as to be subject to the inheritance tax is a question of fact.' Cases illustrating and supporting this rule are: *Spreckels v. State*, 30 Cal. App. 363; *People v. Burkhalter*, 247 Ill. 600; *State v. Pabst*, 139 Wis. 561;

Conway v. State, 120 N. E. 717,—Ind. Appellate."

To the foregoing we subjoin the following definition taken from *George A. Wheelock's Estate v. Commissioner of Internal Revenue*, 13 B. T. A., at p. 831:

> "The phrase 'in contemplation of death,' has been held to mean not that general contemplation of death which is present with all persons, knowing as they do that at some time they must die, but that state of mind or present apprehension resulting from some existing bodily or mental condition or other producing cause which leads to the conviction that death is to be anticipated within a reasonable time in the near future. *Meyer v. United States*, 60 Ct. Cls., 474; *Rea v. Heiner*, 6 Fed. (2nd) 389; *Philip T. Starck, Executor*, 3 B. T. A. 514; *Joseph Edward Phillips*, 7 B. T. A. 1054."

SUPREME COURT OF THE UNITED STATES.

No. 252.—October Term, 1930.

The United States, Petitioner,
vs.
Artemus C. Wells, et al., Executors of the Estate of John W. Wells.

On Writ of Certiorari to the Court of Claims.

[April 13, 1931.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

John W. Wells, a resident of Menominee, Michigan, died on August 17, 1921. The Commissioner of Internal Revenue assessed additional estate taxes, upon the ground that certain transfers by the decedent within two years prior to his death, were made in contemplation of death and should be included in the taxable estate under the provisions of section 402 (c) of the Revenue Act of 1918, 40 Stat. 1057, 1097. The amount of the additional tax was paid by the executors and claim for refund was filed. The claim having been rejected, the executors brought this suit in the Court of Claims to recover the amount paid. The Court of Claims decided in favor of the executors (69 C. Cls. 485, 39 Fed. (2d) 998) and this Court granted a writ of certiorari.

The substance of the findings of the Court of Claims with respect to the circumstances of the transfers may be stated as follows:

The decedent died at the age of seventy-three years; his wife and five children, three sons and two daughters, survived him. When a young man he became interested in the business of acquiring and selling timber lands and of manufacturing lumber. He continued in that business to the time of his death.

As early as the year 1901, decedent began the making of advancements of money and other property to his children. He kept a set of books on which he charged to his children some, but not all, of the amounts transferred to them. The decedent believed that the appropriate course for a man of wealth was to give to his children substantial sums of money during his lifetime while he could advise with them as to its proper use. He informed one of his friends:

"I am making distribution from time to time of part of my property to see what my children will do during my lifetime, and I will then know when my time is up what I ought to do with the balance."[1]

In 1918, decedent advanced to three of his children, Ralph W. Wells, Mrs. Edna Walsh, and Mrs. Florence Law, shares of stock in the Dunbar & Wausaukee Railway Company for which he charged each of them, in the equalization hereafter mentioned, the sum of $25,460. Neither this transfer, nor any of the earlier transfers, is in controversy.

In December, 1919, decedent transferred to his son Artemus C. Wells, 343 shares, and to his son Daniel Wells, 73 shares, of the stock of the J. W. Wells Lumber Company. He charged Artemus with $89,180, and Daniel with $18,890, on account of these transfers.

On January 1, 1921, after carefully examining his accounts in preparing for the final equalization of the prior advancements, decedent transferred to his children 68,985 shares of the stock of the Girard Lumber Company. His summaries of accounts with each of his children showed debit balances, on which he had computed interest, as follows: Daniel Wells, $266,530; Artemus C. Wells, $231,651; Ralph W. Wells, $214,008; Mrs. Florence Law, $216,445; and Mrs. Edna Walsh, $180,662. The decedent endorsed each of these statements with the words "Account with————" "This account is canceled and ledger balanced to date as a gift to———" (the name of the son or daughter being inserted), or with other words to the same effect.

In this process of equalization decedent charged his children with a total of 3458 shares of the capital stock of the Lloyd Manufacturing Company. These shares were not delivered at that time, as decedent had agreed to exchange them for a like number of shares in a new company to result from an expected merger. On January 26, 1921, decedent transferred to Marshall B. Lloyd, as trustee for the benefit of his wife and five children, 3713 shares of the stock of the Lloyd Manufacturing Company with authority to exchange

[1] Speaking of a less liberal policy of a former business associate, who died in or about the year 1918, decedent frequently expressed his opinion that his friend "had made a big mistake in not distributing his property to his children while he was alive to help them handle it properly and said 'that is not my policy'".

these shares for shares of the stock of the new corporation, on the issue of which the trustee was to assign the shares to decedent's wife and children, respectively, in designated amounts, or, in the event that the exchange was not consummated before December 1, 1921, to distribute to them the shares of the Lloyd company.[2] On April 6, 1921, Lloyd, the trustee, distributed the certificates for the shares in the new company, but the finding states that the decedent had divested himself of all interest in the 3713 shares of the Lloyd stock when they were transferred in trust.

The transfers which the Commissioner deemed to be subject to the additional estate tax are these:

That of December, 1919, to his sons Daniel and Artemus, of 416 shares of the stock of the J. W. Wells Lumber Company, increased by a subsequent stock dividend to 1280 shares at the date of the decedent's death;

That of January 1, 1921, to his children, of 68,985 shares of the stock of the Girard Lumber Company;

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[2]On the day that this trust agreement was made, decedent wrote to his son Ralph (then in England): "I am going to divide Lloyd pref. stock and most of G. L. Co. (Girard Lumber Co.) among you children at once so you will have enough to keep you from hunger at least. I own now 5103 Lloyd stock, $100 per share. Income $35,721. I am going to even up my gifts to all now, and the following is the way they stand before the evening up" (inserting statement). "I have charged all of you interest on your accounts at 5% and I have charged you and Art $50,000 apiece for motor loss and credit you for W. P. L. Co. stock charged you. I am mighty busy getting ready for the West, so good-by."

On February 3, 1921, on leaving for California, decedent wrote to his daughter, Mrs. Edna Walsh: "I have been working on my books and evening up all your accounts. Dan, Art, and Ralph have had advances that were more than you and Florence had and I have equalized one with the other by charging each with what they have had and charging them interest on the account to date, and the inclosed sheet shows what each has had and how I equalized your a/cs by giving stock to even. Your Lloyd stock will be delivered as soon as the deal is closed, which will be very soon. Your Lloyd stock is worth $108,600 and the Girard stock is worth $252,000, so you need not take in washing for support unless you throw it away on copper or other junk. In making out these accounts, the thing that seems most important is how interest runs up. Good safe bonds are the best investment for a person who does not understand business. Well, my dear girl, take good care of this, remember the poor and needy, and you will receive your reward, Good-by."

That of January 26, 1921, in trust for his wife and children, of 3713 shares of the stock of the Lloyd Manufacturing Company.

The aggregate value at the time of the decedent's death of all the property embraced in these transfers was $782,903. Excluding this property, the value of decedent's estate at the time of his death was $881,314.61, on which the decedent's annual income was approximately $50,000 a year.

The Court of Claims made detailed findings as to the state of decedent's health. It appeared that for some time prior to the year 1919, he had suffered from attacks of asthma. In May of that year he went to a hospital in Chicago for treatment and remained eleven days. About the middle of April, 1920, decedent began to be afflicted with ulcerative colitis, a condition in which the large intestine becomes inflamed. The finding states: "It is a curable disease. About eighty to eighty-five per cent of the cases are cured." In June, 1920, decedent was advised by physicians in California that he was suffering from cancer of the intestines. In the following July, decedent again entered the hospital in Chicago and, on an examination by a specialist in diseases of the bowels, the case was diagnosed as ulcerative colitis. Between July and September, 1920, decedent was informed in detail of his condition. His physician told him that "he would get well."

While at the hospital, following an inquiry by his business associate, Marshall B. Lloyd, whether decedent had made any agreement with his second wife, Katherine Wells, with reference to a division of property after his death, decedent made such an agreement. Reciting his illness, it provided that his wife "should have $100,000 in money and certain other property in lieu of her statutory and dower rights." Mrs. Wells ratified all gifts theretofore made by the decedent to his children and all gifts which might be made to his children thereafter "and before his death whether any of such gifts be made in contemplation of his death, or otherwise." Pursuant to the agreement, decedent made his will on August 18, 1920, the provisions of which differed only slightly from those of an earlier will. After providing for the payment of $100,000 to his widow and making other bequests, decedent devised his residury estate to his five children, with the proviso: "Provided, however, that the amount shown to be due me from each of my children severally in accordance with my books at the time of my

death, shall be considered advancement made by me to them from time to time and shall be chargeable to each of them severally as advancements and shall be deducted from their respective shares."

On September 14, 1920, decedent wrote to his son Ralph: "The doctors say that I will be absolutely cured if I am careful for two or three months after leaving and I certainly will be careful after this."[3]

On September 22, 1920, decedent was discharged from the hospital in an improved condition. His medical adviser stated that decedent's condition was "excellent",—"he had not fully at that time recovered but he did within the next two or three months." "His appearance was normal; he had gained an appreciable amount of weight" and "he was in a very fair state of health." On his return to Menominee, decedent said to his son, who had been in charge of his affairs during his absence, that "he was completely cured of the trouble that he had had and he felt good." Decedent then resumed his normal business activities.[4]

Decedent was again admitted to the hospital in Chicago, on November 30, 1920, for the purpose of an operation to relieve his asthma. His physician stated that at that time "he found him to be in good general condition."[5] On December 9, 1920, decedent was discharged from the hospital and returned to his home. He went back to the hospital on January 10, 1921, for the completion of the nasal operation.[6] At the time of his discharge on January

[3]At about this time, the hospital physician found marked evidence of an inflammation of the ethmoid cells which are connected with the nasal cavity, and concluded that there was very likely a close relation between the ethmoiditis and the asthma.

[4]Writing to his son Ralph on October 30, 1920, decedent said: "I am around about the same as usual. . . . I feel as well as ever, and bowels seem normal, but doctor says I must diet and take bismuth medicine for a while and be careful. Gained six pounds since I came home."

[5]The physician said that decedent "came to the hospital for treatment of the asthma, not for the bowel trouble. In fact, it was by arrangement when he left the hospital in September that he came back at this time, in November, to have the operative work done on the nose that was designed to clear up the asthma."

[6]His physician then made the following entry in the hospital record with respect to decedent's condition: "In general feels very well. Gained six pounds in weight. Asthma has been somewhat troublesome at times. Has had very good bowel function. No pain. Returns for completion of nasal operation."

14, 1921, the medical examination showed "'a very greatly improved condition' and that "in respect to the ulcerative colitis it was '90 per cent normal.'"

On January 26, 1921, the date of the trust agreement (constituting the last of the transfers in question) decedent wrote to his son Ralph: "The doctors pronounce me cured of bowel trouble, but I will always have asthma. I weigh 140 stripped." On February 3, 1921, he left for California, where he was accustomed to spend the winter months. His physician stated that decedent at that time "considered himself well, and I told him that he need have no anxiety whatever about his state of health; that I considered him in excellent condition; that he need have no fears of any recurrence of the ulcerated colitis.'"

But in April, 1921, while still in California, decedent had such a recurrence. He consulted a specialist of reputation who after examination informed him that he might have a cancer, and advised an operation. In June, 1921, decedent reentered the hospital in Chicago. His condition proved to be due to a virulent form of infection that failed to yield to treatment. Returning to his home, he continued to lose ground and he died August 17, 1921. An autopsy disclosed a severe and extensive innammation of the large intestine, with ulceration of the bowel. No trace of cancer was found. The death certificate signed by his physician set forth the cause of decedent's death as "suppurative colitis" and its "duration one year."

The Court of Claims did not find, in terms, that the transfers in question were not made in contemplation of death, but it is

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[1]In February, 1921, friends of the decedent, visiting him in California, were taken by him on extended motor trips. "Decedent drove the car himself through the congested portion of the city (Los Angeles), as well as around or over the mountains near that city. At places on these mountain roads the automobile party driven by the decedent traversed roads that ran along a precipice where there is a sheer fall of six or seven thousand feet without any apparent concern or distress on the part of the decedent." His friends "did not see any difference in his appearance. He seemed to be just as spry as he ever was, and handled the car in pretty good shape." He was thought to be "very cheerful."

In a letter dated February 21, 1921, written to his children, decedent said: "I am about free of my bowel trouble, but have my old complaint, asthma, but I have taken treatment at Batch Creek Treatment Rooms here the last two years and they have cleared it up and they are now treating me and it is clearing up."

evident that the court considered that its findings of fact amounted to that in substance, in view of the conclusion of law, based upon these findings, that the executors were entitled to recover the additional tax. This is also manifest from the reasoning of the court's opinion. The court said:

"The plaintiffs have not only overcome the presumption created by the statute that the transfers were made in contemplation of death but have definitely established the fact, that the immediate and moving cause of the transfers was the carrying out of a policy long followed by decedent in dealing with his children of making liberal gifts to them during his lifetime. He had consistently followed that policy for nearly thirty years and the three transfers in question were a continuation and final consummation of such policy. In the last transfer such amounts were given to his children as would even them up one with another, in the gifts and advancements made to them.

"That this was the motive which actuated the decedent in making these transfers seems unquestioned. He repeatedly, in letters to his children and in statements to business associates at about the time the transfers were made, gave this as his reason for such transfers. After the final transfer in which the advancements and gifts to the children were evened up in January, 1921, the decedent still possessed property of the value of nearly $900,000, from which he drew an annual income of approximately $50,000. At the time the transfers were made, decedent had no reason to believe otherwise than, aside from his asthma, he was, for a man of his age, in ordinary health. While he had gone through a most serious and painful illness, he had, as he believed, made an almost complete recovery. He was assured of this fact by his physician, an eminent specialist, in whom he had great confidence. The repeated statements made by him to close friends and associates, his daily activities in matters connected with his business affairs, his letters to his children assuring them of his renewed health, show that he fully believed the assurances given him by his physician that he was cured and had nothing to fear on account of his former illness.

"The presumption created by the statute that the transfers in question were made in contemplation of death can not stand against ascertained and proven facts showing the contrary to be true. The best evidence of the state of the decedent's health at the time the transfers were made is the statement of the doctor. The best evidence of the decedent's state of mind at that time and the reasons actuating him in making the transfers are the state-

ments and expressions of the decedent himself, supported as such statements are by all the circumstances concerning the transfers."[8]

The Government contests the decision of the Court of Claims upon the ground that the conclusion was reached by an erroneous construction of the words "in contemplation of death" as used in the statute. The court held that "'contemplation of death' does not mean that general knowledge of all men that they must die, but that there must be a present apprehension, from some existing bodily or mental condition or impending peril, creating a reasonable fear that death is near at hand, and that such reasonable fear or apprehension must be the direct or animating cause, and the only cause of the transfer."[9] The Government insists that this defini-

[8]Referring to the agreement made in the summer of 1920 with the decedent's wife as to her share of his property, and to the making of his will, the court said: "While these transactions are entitled to consideration in connection with all the other facts and circumstances shown, we do not regard them as having a great deal of weight in determining the question as to the decedent's state of mind and the motives actuating him in making transfers of property, four months later. No transfers of property were made to the children at the time of the execution of the property agreement with his wife, and the provisions made for their benefit in the will executed at that time were identical with the provisions of a former will. Whatever apprehensions the decedent entertained at the time of the making of the property agreement with his wife as to the changes of recovery from the illness from which he was suffering at that time, had ceased to exist before the transfer of the Girard Lumber Company stock on January 1, 1921, and the Lloyd Manufacturing Company stock on January 26, 1921."

[9]In support of this view, the court cited Spreckles *v.* State, 30 Cal. App. 363; Shwab *v.* Doyle, 269 Fed. 321; Meyer *v.* United States, 60 C. Cls. 474; Rea *v.* Heiner, 6 F. (2d) 389; and Starck, Executor, 3 B. T. A. 514. See, also, Phillips, Executor, 7 B. T. A. 1054; Stein, et al., Executors, 9 B. T. A. 486; Gimbel, et al., Executors, 11 B. T. A. 214; George A. Wheelock's Estate, 13 B. T. A. 831; Commonwealth *v.* Fenley, 189 Ky. 480; State *v.* Pabst, 139 Wis. 561; State *v.* Thompson, 154 Wis. 320; Gaither *v.* Miles, 268 Fed. 692; Vaughan *v.* Riordan, 280 Fed. 742; Flannery *v.* Willcuts, 25 F. (2d) 951; Beeler *v.* Motter, 33 F. (2d) 788; Rosenthal *v.* People, 211 Ill. 306; People *v.* Burkhalter, 247 Ill. 600; People *v.* Carpenter, 264 Ill. 400; People *v.* Northern Trust Co., 324 Ill. 625; Matter of Baker, 83 App. Div. (N. Y.) 530, affirmed 178 N. Y. 575; Matter of Palmer, 117 App. Div. (N. Y.) 361; Matter of Baird, 219 App. Div. (N. Y.) 418. But, compare Estate of Reynolds, 169 Cal. 600; Estate of Pauson, 186 Cal. 358; Chambers *v.* Larronde, 196 Cal. 100; Armstrong *v.* Indiana, 72 Ind. App. 303; Matter of Crary, 31 Misc. (N. Y.) 72; Matter of Price, 62 Misc. (N. Y.) 149; Tax Commission *v.* Parker, 117 Ohio St. 215; Rengstorff *v.* McLaughlin, 21 F. (2d) 177.

tion is too narrow; that transfers in contemplation of death are not limited to those induced by a condition causing expectation of death in the near future; that the character of such gifts is determined by the state of mind of the donor at the time they are made, and that the statutory presumption may be overcome only by proof that the decedent's purpose in making the gift was to attain some object desirable to him during his life, as distinguished from the distribution of his estate as at death.

The phrase "in contemplation of death", previously found in state statutes, was first used by the Congress in the Revenue Act of 1916, imposing an estate tax. It was coupled with a clause creating a statutory presumption in case of gifts within two years before death.[10] The provision was continued in the Revenue Act of 1918,[11] which governs the present case, and in later legislation. While the interpretation of the phrase has not been uniform, there has been agreement upon certain fundamental considerations. It is recognized that the reference is not to the general expectation of death which all entertain. It must be a particular concern, giving rise to a definite motive.[12] The provision is not confined to gifts *causa mortis*, which are made in anticipation of impending death,

[10] 39 Stat. 756, 777, 778.

[11] 40 Stat. 1057, 1097. Section 402 (c) provides: "To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;"

[12] Article 23 of Regulations 37, under the Revenue Act of 1918, contained the following:

"Art. 23. Nature of Transfer.—The words 'in contemplation of death' do not refer to the general expectation of death which all persons entertain. A transfer, however, is made in contemplation of death wherever the person making it is influenced to do so by such an expectation of death, arising from bodily or mental conditions, as prompts persons to dispose of their property to those whom they deem proper objects of their bounty. The cause which induces such bodily or mental conditions is immaterial; and it is not necessary that the decedent be in the immediate expectation of death. Such a transfer is taxable, although the decedent parts absolutely and immediately

are revocable, and are defeated if the donor survives the apprehended peril. *Basket* v. *Hassell*, 107 U. S. 602, 609, 610.[13] The statutory description embraces gifts *inter vivos*, despite the fact that they are fully executed, are irrevocable and indefeasible. The quality which brings the transfer within the statute is indicated by the context and manifest purpose. Transfers in contemplation of death are included within the same category, for the purpose of taxation, with transfers intended to take effect at or after the death of the transferor. The dominant purpose is to reach substitutes for testamentary dispositions and thus to prevent the evasion of the estate tax. *Nichols* v. *Coolidge*, 274 U. S. 531, 542; *Milliken* v. *United States*, decided March 2, 1931, 282 U. S. —. As the transfer may otherwise have all the indicia of a valid gift *inter vivos*, the differentiating factor must be found in the transferor's motive. Death must be "contemplated", that is, the motive which induces the transfer must be of the sort which leads to testamentary disposition. As a condition of body or mind that naturally gives rise to the feeling that death is near, that the donor is about to reach the moment of inevitable surrender of ownership, is most likely to prompt such a disposition to those who are deemed to be the proper objects of his bounty, the evidence of the existence or non-existence of such a condition at the time of the gift is obviously of great importance

with his title to and possession of the property. Transfers made within two years of a decedent's death are presumed to be taxable if they are of a material part of his property and are in the nature of a final disposition thereof. . . . All facts relating to the transfer should be stated, including the motive therefor, the decedent's state of health, and his anticipation of death. The presumption of taxability may be rebutted by proof that the transfer was not induced by bodily or mental conditions leading the grantor to make a disposition of property testamentary in its nature. The fact that a gift was made as an advancement, to be taken into account upon the final distribution of the decedent's estate, is not enough, standing alone, to establish taxability; but it is a circumstance to be considered in determining whether the transfer was made in contemplation of death."

[13] *In Matter of Seaman*, 147 N. Y. 69, 76, the court, referring to the words "in contemplation of death" in the Inheritance Tax Law of New York, said that the clause "evidently referred to grants or gifts *causa mortis*." See also Matter of Edgerton, 35 App. Div. (N. Y.) 125, affirmed 158 N. Y. 671; Matter of Spaulding, 49 App. Div. (N. Y.) 541, affirmed 163 N. Y. 607; Matter of Baker, 83 App. Div. (N. Y.) 530, affirmed 178 N. Y. 575. But compare Matter of Palmer, 117 App. Div. (N. Y.) 361, 366, 367, 368; Matter of Crary, 31 Misc. (N. Y.) 72, 75; Matter of Price, 62 Misc. (N. Y.) 149, 151, 152; Matter of Dee, 148 N. Y. Supp. 423, affirmed 161 App. Div. (N. Y.) 881, affirmed 210 N. Y. 625; Matter of Hodges, 215 N. Y. 447.

in determining whether it is made in contemplation of death. The natural and reasonable inference which may be drawn from the fact that but a short period intervenes between the transfer and death is recognized by the statutory provision creating a presumption in the case of gifts within two years prior to death. But this presumption, by the statute before us, is expressly stated to be a rebuttable one, and the mere fact that death ensues even shortly after the gift does not determine absolutely that it is in contemplation of death. The question, necessarily, is as to the state of mind of the donor.

As the test, despite varying circumstances, is always to be found in motive, it cannot be said that the determinative motive is lacking merely because of the absence of a consciousness that death is imminent. It is contemplation of death, not necessarily contemplation of imminent death, to which the statute refers. It is conceivable that the idea of death may possess the mind so as to furnish a controlling motive for the disposition of property, although death is not thought to be close at hand. Old age may give premonitions and promptings independent of mortal disease. Yet age in itself cannot be regarded as furnishing a decisive test, for sound health and purposes associated with life, rather than with death, may motivate the transfer. The words "in contemplation of death" mean that the thought of death is the impelling cause of the transfer, and while the belief in the imminence of death may afford convincing evidence, the statute is not to be limited, and its purpose thwarted, by a rule of construction which in place of contemplation of death makes the final criterion to be an apprehension that death is "near at hand."

If it is the thought of death, as a controlling motive prompting the disposition of property, that affords the test, it follows that the statute does not embrace gifts *inter vivos* which spring from a different motive. Such transfers were made the subject of a distinct gift tax, since repealed.[14] As illustrating transfers found to be related to purposes associated with life, rather than with the distribution of property in anticipation of death, the Government mentions transfers made "for the purpose of relieving the donor of the cares of management or in order that his children may experience the responsibilities of business under his guidance and

[14] Revenue Act of 1924, secs. 319-324, 43 Stat. 253, 313, as amended by Revenue Act of 1926, sec. 3324, 44 Stat. 9, 86. Bromley *v.* McCaughn, 280 U. S. 124. Revenue Act of 1926, sec. 1200 (a), 44 Stat. 9, 125, 126.

supervision." The illustrations are useful but not exhaustive. The purposes which may be served by gifts are of great variety. It is common knowledge that a frequent inducement is, not only the desire to be relieved of responsibilities, but to have children, or others who may be the appropriate objects of the donor's bounty, independently established with competencies of their own, without being compelled to await the death of the donor and without particular consideration of that event. There may be the desire to recognize special needs or exigencies or to discharge moral obligations. The gratification of such desires may be a more compelling motive than any thought of death.

It is apparent that there can be no precise delimitation of the transactions embraced within the conception of transfers in "contemplation of death", as there can be none in relation to fraud, undue influence, due process of law, or other familiar legal concepts which are applicable to many varying circumstances. There is no escape from the necessity of carefully scrutinizing the circumstances of each case to detect the dominant motive of the donor in the light of his bodily and mental condition, and thus to give effect to the manifest purpose of the statute.

We think that the Government is right in its criticism of the narrowness of the rule laid down by the Court of Claims, in requiring that there be a condition "creating a reasonable fear that death is *near at hand,*" and that "*such* reasonable fear or apprehension" must be "the only cause of the transfer." It is sufficient if contemplation of death be the inducing cause of the transfer whether or not death is believed to be near. But it does not appear that the decision of the court rests upon the limitation thus expressed. The court did not rely merely upon the fact that at the time of the transfers decedent considered that he had recovered from his former illness and believed the assurances given him by his physician that he need have no fear of its recurrence or any "anxiety whatever about his state of health." That fact was manifestly important, but, in addition to that, the court held that "the immediate and moving cause of the transfers was the carrying out of a policy, long followed by decedent in dealing with his children of making liberal gifts to them during his lifetime." The court regarded the transfers in question as "a continuation and final consummation of such policy", saying "that this was the motive which actuated the decedent in making these transfers seems unquestioned." In the view of the court as thus

explicitly stated, not only was there no fear at the time of the transfers that death was near at hand, but the motive for the transfers brought them within the category of those which, as described by the Government, are intended by the donor "to accomplish some purpose desirable to him if he continues to live." In the presence of such a motive, appropriately found, and of the underlying facts which have been expressly found, there would be no ground for a reversal of the judgment merely because of an inaccuracy in the general statement as to the meaning of the statutory phrase.

The only difficulty presented by the record is that this statement with respect to the motive of decedent appears in the opinion of the court and not in its findings of fact. We are not at liberty to refer to the opinion for additional findings. The findings of fact of the Court of Claims are to be treated like the verdict of a jury.[14] We cannot add to them, or modify them, but the absence of the finding of an ultimate fact does not require a reversal of the judgment if the circumstantial facts as found are such that the ultimate fact follows from them as a necessary inference.[15]

It is evident that the court did not consider the statements in its opinion, which we have quoted, as additional findings of fact, but as an argument with respect to the conclusion to be drawn from its findings. In its opinion, the court was summarizing what it considered to be the effect of its findings, and no useful purpose would be served in returning the case for a specific finding that the motive which impelled the decedent to make the transfers was precisely that which the court has thus definitely stated. While, in accordance with proper practice and the rule of this Court,[16] the Court of Claims should have found the ultimate fact, and we do not approve the method it adopted, we are of the opinion that, in view of the findings of fact actually made and the conclusion they import, the judgment should be sustained.[17]

Judgment affirmed.

Mr. Justice ROBERTS took no part in the consideration or decision of this case.

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[14]Stone *v.* United States, 164 U. S. 380, 382, 383; Crocker *v.* United States, 240 U. S. 74, 78; Brothers *v.* United States, 250 U. S. 88, 93.

[15]United States *v.* Pugh, 99 U. S. 265, 269, 270; Botany Mills *v.* United States, 278 U. S. 282, 290.

[16]Rule 41.

[17]Act of February 26, 1919, c. 48, 40 Stat. 1181; U. S. C., Tit. 28, sec. 391.